APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-4111.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY; Utahns for Fairness; Utah National Organization for Women; Craig S. Axford,

Plaintiffs-Appellants,

v.

SALT LAKE CITY CORPORATION, a municipal corporation,

Defendant-Appellee,

Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints,

Defendant-Intervenor-Appellee,

Association of Christian Schools International; Colorado Baptist General Convention; Colorado Catholic Conference; Community of Christ; Diocese of Colorado; Evangelical Lutheran Church in America; First Church of Christ, Scientist; General Conference of Seventh-Day Adventists; Islamic Society of Colorado Springs; Mid-America Union Conference of Seventh-Day Adventists; the Navigators; Rocky Mountain Conference of Seventh-Day Adventists; the Evangelical Covenant Church; the General Council on Finance and Administration of the United Methodist Church; Worldwide Church of God; Sutherland Institute; International Municipal Lawyers Association; National League of Cities; National Association of Counties; and Utah Association of Counties,

Amici Curiae.

Oct. 9, 2002

Before SEYMOUR, McWILLIAMS and HENRY, Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiffs brought this action under 42 U.S.C. § 1983 challenging on First Amendment grounds the prohibition of expressive activity by Salt Lake City on a public pedestrian easement retained by the City after the sale of a portion of a downtown public street to a religious organization. The district court granted summary judgment to defendant. *First Unitarian Church of Salt Lake v. Salt Lake City Corp.*, 146 F.Supp.2d 1155 (D.Utah 2001). Plaintiffs appeal and, for the reasons stated below, we reverse and remand.

I

The relevant facts set forth here are not in dispute. This case concerns a portion of Main Street in downtown Salt Lake City that the City closed and sold to the Church of Jesus Christ of Latter-Day Saints (LDS Church).[1] Main Street runs north-south through downtown Salt Lake City. The portion sold to the Church is bounded on the north by North Temple Street and on the south by South Temple Street. To the north lies a residential neighborhood. To the south is the City's business district, including two large shopping malls.

The LDS Church owns all the property on the two city blocks on the east and west sides of this portion of the former Main Street. On these blocks the Church maintains a number of important historical, administrative, and worship

[1] The sale was actually to the Corporation of the Presiding Bishop, a corporate entity wholly owned by LDS Church. We refer to both entities as "LDS Church."

facilities. The west block is called "Temple Square" and contains the Mormon Tabernacle and the Salt Lake Temple; the east block houses the Church administration buildings. Temple Square and related attractions are an extremely popular tourist attraction.

In 1995, the Salt Lake City Corporation (City) sold the subsurface rights to this portion of Main Street to the LDS Church, which the Church eventually developed into an underground parking garage. That agreement also gave the Church a right of first refusal on the surface property, should the City ever decide to sell it. In 1996, the City considered closing this portion of Main Street to automobile traffic but leaving it open to pedestrians, and also considered selling the land to the Church for this purpose. The proposal was eventually dropped.

In 1998, the City again explored the possibility of closing a portion of Main Street and selling it to the Church for the construction of a pedestrian plaza. On December 1, 1998, the City and LDS Church held a joint news conference to announce "a proposal to develop an open-space pedestrian plaza" on Main Street between North and South Temple. Aplt.App. vol. I at 356 (LDS Church news release). The Church thereafter filed a petition with the City for street closure and plans with the City Planning Commission for a pedestrian plaza.

On April 13, 1999, the City Council approved the closure and sale of the Main Street block to LDS Church subject to certain conditions. In the process leading to approval, the Planning Commission recommended that the City Council approve the sale contingent on several conditions that reflected the Commission's concern with ensuring public access and allowing public expression on the pedestrian plaza. The suggestions included a recommendation that the City retain a perpetual pedestrian easement "planned and improved so as to *maintain, encourage, and invite public use*"

and "[t]hat there be no restrictions on the use of this space that are more restrictive than is currently permitted at a public park." Aplt.App. vol. III at 1220 (emphasis added).

The ordinance the City Council adopted retained only some of these conditions. The first recommendation, that the City retain an easement for public use "planned and improved so as to maintain, encourage, and invite public use," was a condition of the ordinance as approved by the City Council. *Id.* vol. I at 191. In addition, the Council suggested during its meeting that the City retain a right of reverter to the property to ensure that the Church met these conditions, in particular providing public access. *See id.* vol. II at 401. However, the latter condition, that the plaza be regulated no more strictly than a public park, was omitted from the ordinance.

The City subsequently recorded a Special Warranty Deed and Reservation of Easement conveying the Main Street surface property to the Church. The reservation allows only non-speech conduct on the easement and also specifically prohibits a number of expressive activities. The reservation of easement reads:

> 1.3 *Pedestrian Access and Passage:* Subject to the conditions, limitations, and restrictions set forth in section 2 hereinbelow, Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage only . . . . Grantee shall not erect any perimeter fences or gates on the Property along the North Temple or South Temple rights of way . . . . Grantor may allow the general public to use this easement for pedestrian access and passage only, but all use of this easement shall be subject to the conditions, limitations, and restrictions described hereinbelow.

Id. vol. I at 361. The reservation contains the following restrictions with respect to the use of the easement:

> 2.2 *Right to Prevent Uses Other Than Pedestrian Passage:* Nothing in the reservation or use of this easement

> shall be deemed to create or constitute a public forum, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other users of the easement and are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

Id. at 362. The reservation gives the LDS Church the right to exclude anyone who has previously engaged in any of the above conduct while using the easement (the "Habitual Violator" provision). The City also reserved utility easements, access for emergency and police vehicles, and a view corridor which restricts the erection of buildings on the plaza. Finally, as suggested by the City Council, the reservation contains a Right of Reverter providing that if "Grantee fails to use the Property for the purposes set forth herein, or fails to maintain the Property thereafter," ownership may revert to the City. *Id.*

At its own expense, the Church reconstructed the former street and sidewalks, making the area an attractive plaza that fits seamlessly into the Church's downtown campus. There are paved walking areas interrupted by planters, benches, and waterfalls, a large reflecting pool, and changes in grade. The Church uses the plaza for religiously-oriented exhibits, dissemination of information, and special events, as well as for the entrance to the Temple Square.

While the Church now refers to the area as an ecclesiastical park, prior to the sale when asked how it would further the public interest, the Church variously described the proposed Main Street Plaza as "a pedestrian-friendly area," "a funnel to the Crossroads and ZCMI Center shopping malls as well as the remainder of the downtown business district," and "a downtown pedestrian plaza," and stated the plaza would "provide a public environment," "enhance the urban fabric of the downtown area," "emphasize Main Street as a primary pedestrian walkway," and "assist Main Street, which is the heart of the shopping area, to become the most pedestrian oriented street in Salt Lake City." *Id.* vol. IV at 1584-89.

Plaintiffs, which include First Unitarian Church of Salt Lake City, Utahns for Fairness, Utah National Organization of Women, and Craig Axford, filed this action challenging the sale and the easement restrictions under the First and Fourteenth Amendments and similar provisions of the Utah Constitution. Specifically, plaintiffs asserted the restrictions are facially invalid because the entire plaza, or alternatively the retained easement, remains public property on which speech cannot be so restricted. They also claimed the City had delegated to the LDS Church the discretion to interpret and enforce the restrictions in violation of the Establishment Clause, and that the property transaction itself violated the Establishment Clause because it included the challenged restrictions. They further contended the restrictions vio-

late the Equal Protection Clause because they discriminate between the Church and members of the public. Plaintiffs sought declaratory and injunctive relief.

The suit named the City as defendant and the LDS Church was permitted to intervene. All parties filed cross-motions for summary judgment.[2] After a hearing, the district court granted defendant's and intervenor's motions for summary judgment on all claims and denied plaintiffs' motion. The court determined that the physical characteristics, use, and purpose of the property had fundamentally changed after the sale and development of the plaza, and concluded that the easement was no longer a public forum.[3] The court then held that the easement is government property that "could be considered a nonpublic forum." 146 F.Supp.2d at 1174. The court nonetheless held that the restrictions are reasonable because the property would not otherwise have been sold and because the prohibited activities are incompatible with the property's new purpose, an ecclesiastical park. The court also held the restrictions do not constitute viewpoint discrimination because the LDS Church, as a private owner of the plaza property, has greater rights on the easement than members of the public.

With regard to the Establishment Clause claims, the district court held the restrictions do not delegate any municipal power to the Church because the Church was merely given the ability to enforce its rights as a private property owner.

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[2] Plaintiffs moved for partial summary judgment on only their claim that the restrictions on the easement are invalid under the free speech clause of the First Amendment. Our ruling in favor of plaintiffs on this issue nevertheless disposes of plaintiffs' remaining claims because they all rest on the existence of the easement restrictions, which we hold invalid.

[3] Plaintiffs stated in the hearing on summary judgment that they were abandoning their claim that the *entire* plaza is a public forum, and the district court accordingly ruled only on the easement.

The court rejected the Establishment Clause challenge to the sale, holding the plaintiffs did not produce any evidence of collusion between the City and the Church and the sale did not otherwise violate the Establishment Clause. The court rejected the Equal Protection Claim on the ground that any discrimination between the Church and the public rationally reflected the Church's greater rights as the property owner.

II

We review the grant of summary judgment de novo. *See Jurasek v. Utah State Hosp.*, 158 F.3d 506, 510 (10th Cir.1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed.R.Civ.P. 56(c)). In applying this standard, we review the factual record and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Id.* If no genuine issue of material fact exists, we determine whether the district court properly applied governing substantive law. *Id.* Because First Amendment interests are involved, we have an obligation to conduct an independent review of the record and to examine constitutional facts and conclusions of law de novo. *ZJ. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683, 685 (10th Cir.1998) (citing *Revo v. Disciplinary Bd.*, 106 F.3d 929, 932 (10th Cir.1997)).

We may direct that judgment be entered in favor of any moving party we conclude is entitled to summary judgment on the record before us. *See id.* (citing *Dickeson v. Quarberg*, 844 F.2d 1435, 1444 n. 8 (10th Cir.1988) (court of appeals may grant summary judgment even to nonmoving party if "'the facts were fully developed at the summary judgment hearing so that the court of appeals can determine that the nonmoving party clearly was entitled to a judgment as a

matter of law . . . and there is no procedural prejudice to the moving party.'") (quoting 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2720)).

A.

We consider first the free speech claim. The district court held *sua sponte* that plaintiffs' free speech claim was ripe only with respect to the prohibitions on "demonstrating, assembling, picketing, distributing literature, erecting signs or displays, using devices to project spoken messages or music." *First Unitarian Church*, 146 F.Supp.2d at 1163-65 (D.Utah 2001). This would preclude, for example, any attack on the prohibition against "engaging in any [ ] offensive . . . speech, dress or conduct." Aplt.App. vol. I at 362. On the contrary, however, we have no doubt plaintiffs' facial challenge to the entire set of restrictions is ripe. Significantly, it is not particular restrictions contained in the deed that are at issue because the City and the Church claim that the easement is private property and that there are no public speech rights whatsoever on it. The Church thus asserts plenary authority to regulate speech on the easement. *See* Aplt.App. vol. IV at 1382-83 (Plaza security policy). The City similarly maintains that "the easement does not allow any speech at all from those using the easement." Aple.App. at 44; *see also* Def./Aple. Br. at 22, 26, 40, 41. The issue is therefore whether the City has the authority to prohibit all expressive activities on a public easement it reserved across otherwise private property, except for the speech permitted by the private owner of the underlying estate. Because plaintiffs have asserted the intention to use the easement for expressive activity and the Church and City assert the Church is empowered to prevent any such activity, we easily conclude plaintiffs' facial claim is ripe as to the entire prohibition of speech, dress, or conduct on the pedestrian easement.

Plaintiffs contend the easement is a public forum because it has the characteristics of a public sidewalk, a traditional public forum. They also argue the easement has substantially the same characteristics, use, and purpose as the Main Street sidewalks the easement replaced and it therefore remains a public forum notwithstanding the City transferred legal title to the LDS Church. Alternatively, plaintiffs contend the easement as retained by the City is public property and is therefore at least a nonpublic forum for which the speech restrictions are neither reasonable nor viewpoint-neutral.

The City and LDS Church maintain the easement cannot be a public forum because the property's character, use, and purpose have changed sufficiently to eliminate any public forum that existed before the street was sold, and because the City expressly disavowed any intent to create or continue a public or limited forum. They also argue the easement itself cannot be government property subject to forum analysis because the scope of the easement does not include speech activities, and because an easement is an insufficient government property interest to trigger First Amendment limitations.

As an initial matter, we address the argument advanced by the City and LDS Church that the First Amendment cannot apply to the easement according to its terms because the reservation is for "pedestrian passage only" and expressly excludes speech activities. The parties contend the Church cannot be required to permit speech activities on the easement because this would exceed the scope of the property interest created by the reservation.

We agree that the reservation of easement on its face defines the easement to exclude expressive activities. However, a deed does not insulate government action from constitutional review. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) (easements to which government is party are subject to the Constitution). If government actions taken with respect to the easement violate the

Constitution, this simply means the easement terms themselves are unconstitutional and must be altered or eliminated by the involved property owners.

We next address the central contention of the City and LDS Church that the easement is not "government property" and First Amendment forum principles therefore do not apply at all. *See generally Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (determining initially whether "public forum principles apply . . . at all" to public broadcasting). The City and Church claim that because an easement is not a possessory interest in land and the Church continues to hold title to the underlying property burdened by the easement, the easement is not "government property" subject to forum analysis.

We do not disagree with the technical characterization of easements as nonpossessory property interests, *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2. However, forum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist. *See United States v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981) (applying forum principles to privately owned mailboxes "controlled by the government"); *see also Marsh v. Alabama*, 326 U.S. 501, 505, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (title to property not necessarily determinative of public speech rights on property); *Venetian Casino v. Local Joint Executive Bd.*, 257 F.3d 937, 945 n. 6 (9th Cir.2001) (sidewalks need not be government owned to constitute public fora).

Indeed, forum analysis does not require the existence of government property at all. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-01, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (rejecting argument that forum analysis requires "tangible government property" or even a

"physical situs" for the forum) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Therefore, whether we characterize the easement as a property interest belonging to the government, or as property owned by a private party but burdened by the government, the First Amendment may still apply.

The City and LDS Church similarly argue that easements cannot be subject to forum analysis because they do not constitute a significant enough property interest. We disagree. Government condemnations of easements are takings under the Fifth Amendment and entitle the grantor to compensation. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (public easement required as a condition of development permit is a taking requiring compensation); *see also Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990) (easements are property rights protected under the Utah Constitution from government takings without due process); *Hayes v. Gibbs*, 110 Utah 54, 169 P.2d 781 (1946) (same). Easements are therefore constitutionally cognizable property interests.[4]

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[4] The LDS Church also contends that permitting public speech on the easement would constitute a taking of its property. *But see generally PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (rejecting mall owner's claim that state law requiring him to permit speech at his mall was a Fifth Amendment taking of his property). Essentially the Church's claim is that speech would "take" a larger estate than the easement. Our answer is the same as our answer above addressing the argument that the free speech claim is precluded by the narrow scope of the easement itself: the issue before us is whether it is constitutionally permissible for the City to retain a pedestrian easement but prohibit expressive conduct on that easement. If we conclude it is not, it is up to the City and the Church to modify their property transaction so the actions of the City conform to the Constitution. Any claim that a potential solution to this problem, which may or may not be attempted, would itself present other constitutional problems is speculative and not before us.

Finally, holding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners.

> Highways and streets are public property only in the sense that they are subject to public use . . . . As a rule, and whether a highway is established by dedication or prescription, or by the direct action of the public authorities, *the public acquires merely an easement of passage*, the fee title remaining in the landowner.

39 AM.JUR.2D *Highways, Streets, & Bridges* §§ 182-83 (1999) (emphasis added) (citations omitted); *see also M.B.M., Inc. v. George*, 655 F.2d 530, 532 (3rd Cir.1981) ("At common law, ownership of land used as a highway belongs to the abutting landowner, subject to the public's right to use the road."); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 233 Kan. 375, 664 P.2d 798, 800 (1983) (public highways only grant easement to public; title remains in abutting property owner).

Public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Because such traditional public fora are often easements, it is evident the property here is not exempt from the First Amendment merely because it is an easement rather than land to which the government holds fee title.[5] "Wherever the title of streets and parks may rest, they

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[5] We hold only that the mere fact the government has an easement rather than fee title does not defeat application of the First Amendment. We are not holding the converse, that the First Amendment applies to all easements. Whether or not a particular government easement warrants application of forum principles will depend on the characteristics of the easement, the practical considerations of applying forum principles, and the particular context the case presents. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-77, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998).

have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (Roberts, J., concurring); *see also Venetian Casino*, 257 F.3d at 943-45 & n. 6 (applying forum analysis to city easement for sidewalk on private property); *Thomason v. Jernigan*, 770 F.Supp. 1195, 1197 (E.D.Mich.1991) (adjudicating public speech rights on municipal right-of-way reserved by easement on private property). Accordingly, we reject the argument that the government easement cannot be a First Amendment forum of any kind.

B.

Having decided forum principles apply to the easement, we proceed to analyze this case under those principles. The extent to which government may control expressive activities depends on the nature of the relevant forum. *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439.

The Supreme Court has identified three types of forums, "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633 (quotations and citations omitted). "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or government fiat,' the property has been 'devoted to assembly and debate.'" *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. 948). Designated public fora are created by "purposeful government action, . . . by intentionally opening a nontraditional public forum for public discourse." *Id.* Other property is either a nonpublic forum or not a speech forum at all. *Id.*

Plaintiffs assert the easement is a public forum because it has all the characteristics of sidewalks, which are traditional public fora "without more." *Grace*, 461 U.S. at 177, 103

S.Ct. 1702 (1983). They also assert the easement is a public forum because it is essentially the same sidewalk that ran along the former Main Street, which was unquestionably a public forum. The City and LDS Church respond that the easement cannot be a public forum because of express language in the reservation of easement stating the space does not constitute a public forum. They also argue the physical characteristics of the former Main Street have been changed sufficiently by development of the plaza to eliminate any public forum that existed along the former Main Street.

We first reject the contention that the City's express intention not to create a public forum controls our analysis. The government cannot simply declare the First Amendment status of property regardless of its nature and its public use. *See Forbes*, 523 U.S. at 678, 118 S.Ct. 1633 ("traditional public fora are open for expressive activity *regardless of the government intent* ") (emphasis added); *Grace*, 461 U.S. at 180, 103 S.Ct. 1702 (the government's own "*ipse dixit*" does not determine the First Amendment status of property); *see also Int'l Soc'y for Krishna Consciousness v. Lee (ISKCON)*, 505 U.S. 672, 694, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (Kennedy, J., concurring in judgment) (First Amendment doctrine should not "grant[] the government authority to restrict speech by fiat."). It is only with respect to designated fora that the Supreme Court's forum analysis has focused on whether there has been "purposeful government action" creating a forum "in a place not traditionally open to assembly and debate." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633; *see also Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 (examination of whether charity drive among federal employees created designated public forum, focusing on "policy and practice" of government as well as objective nature of forum); *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286 (10th Cir.1999) ("The designated public forum . . . is one a state creates by intentionally opening a *non-traditional* forum for public discourse.") (quotation and citation omitted)

(emphasis added); *cf. United States v. Kokinda*, 497 U.S. 720, 738, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (Kennedy, J., concurring in judgment)[6] (objective factors have "more force here *than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose*." (citing *Perry Educ. Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794, and *Cornelius*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567)) (emphasis added). Examples of designated public fora include "state university meeting facilities expressly made available for use by students, . . . school board meetings open to the public by state statute, . . . advertising space in state-owned subway and commuter rail stations, . . . [and] a city owned and operated senior center sponsoring lectures." *Hawkins*, 170 F.3d at 1287 (quotations and citations omitted).

In contrast, for property that is or has traditionally been open to the public, objective characteristics are more important and can override express government intent to limit speech. *See Kokinda*, 497 U.S. at 738, 110 S.Ct. 3115 (Kennedy, J., concurring) (legitimate justifications for restrictions notwithstanding, "other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended."); *id.* at 737-38, 110 S.Ct. 3115 ("[C]ertain objective characteristics of Government property and its customary use by the public may control the case."). As Justice Kennedy wrote for a majority in *Forbes*, "public fora are defined by the objective characteristics of the property." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633. This is not to say the government has automatically created a public forum by opening property to the public, *Grace*, 461 U.S.

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[6] We cite Justice Kennedy's concurrence as controlling Supreme Court precedent because his concurrence provided the fifth vote on the narrowest grounds. *See Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir.1999) (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

at 177, 103 S.Ct. 1702, but if it has so opened the property, objective characteristics determine whether it is a public forum.

Justice Kennedy elaborated on what he meant by examining objective characteristics to determine if property is a public forum in his concurrence in *ISKCON:*

> "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property."

ISKCON, 505 U.S. at 698-99, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment). We apply these factors to assess the easement's character for First Amendment purposes. To determine the easement's nature and purpose, the question we address is whether expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether the government has expressly designated speech as a purpose of the property. *See ISKCON*, 505 U.S. at 686, 112 S.Ct. 2701 (O'Connor, J., concurring)[7] (examining whether public access is "'inherent in the open nature of the locations.'" (quoting *Kokinda*, 497 U.S. at 743, 110 S.Ct. 3115 (Brennan, J., dissenting))); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576, 107

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[7] Justice O'Connor provided the fifth vote on the narrowest grounds in this case. *See supra* note 6.

S.Ct. 2568, 96 L.Ed.2d 500 (1987) (invalidating statute for prohibiting "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—*[which] may not be 'airport related' but is still protected speech even in a nonpublic forum.*") (emphasis added).

The actual purpose and use of the easement here is a pedestrian throughway for the general public. This is not merely the use which the City has in practice permitted, but also the express purpose for which the City retained the easement. The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area to the north of the plaza and the business areas to the south.

The easement has particular public importance for the City because of the role the City envisioned the easement playing in the character and development of downtown Salt Lake City. While the City wanted to close the street to automobile traffic, it simultaneously wanted to preserve and indeed encourage pedestrian traffic. The easement through the plaza was specifically retained in order to preserve and enhance the pedestrian grid in the downtown. The City points out that developing pedestrian malls by closing downtown streets has been a stated goal of various long-range City plans for almost forty years. Aplt.App. vol. I at 214, 224, 228. As the City itself asserts, the easement was a necessary means of accomplishing these public purposes even as it sold the underlying property to the LDS Church.

Moreover, the City's actions approving the sale and the resulting property ownership structure were specifically designed to ensure these aims were accomplished, and the pedestrian easement was central to these goals. The ordinance the City Council passed approving the street closure

and sale—the City's necessary legislative act for closing and selling a public street—was expressly contingent on several conditions. The first of these was that the City retain a perpetual pedestrian easement "planned and improved so as to *maintain, encourage, and invite public use*." *Id.* vol. I at 191 (emphasis added). In addition, the reservation of easement contains a right of reverter in favor of the City that provides the property will revert to the City if the LDS Church "fails to use the Property for the purposes set forth" in the deed and easement. *Id.* at 362. In its meeting approving the ordinance, the City Council requested the City administration to negotiate a right of reverter in the deed specifically to ensure the plaza would be kept open for public use as promised. *Id.* vol. II at 401. Finally, the City has contended throughout this litigation that the City would not have agreed to the sale "but for" the easement.[8] *See, e.g.*, Aple.App. at 61. These circumstances indicate the easement is infused with public purposes even broader than providing a pedestrian walkway.

The City and Church contend the purpose of the easement is solely for ingress and egress to Church facilities. They produced evidence in the district court that the vast majority of users were those with Church business or tourists whose end destination was the plaza itself or various Church facilities. This argument is at odds with the publicly and legislatively stated purposes of the easement noted above. In addition, to the extent individuals with Church business enter onto the plaza, it is not clear they are actually using the easement because they are not utilizing the plaza for "pedestrian passage" and presumably the Church would permit those with Church business to enter the plaza in the

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[8] Indeed, the City and Church disagree as to the effect of holding the restrictions unconstitutional. The City contends this would eliminate the restrictions but not the easement; the Church contends the government would lose the easement. *See* Aple.App. at 61, 68.

absence of the easement. In other words, providing access to those with Church business is more properly characterized as a Church purpose, and does not capture the actual or articulated purpose of the easement, a pedestrian walkway for the public at large.

Similarly, the City and Church argue that not all walkways are sidewalks, and that the easement here is more similar to the walkways at issue in *Hawkins* than to a public sidewalk that is a traditional public forum. We agree that not all walkways are traditional public fora, but because the purpose of the easement is not limited to ingress and egress to Church facilities, but is intended rather for pedestrian passage, it is distinguishable from those walkways that have been held not to be public fora.[9] In *Hawkins*, we held that walkways within the Galleria, a partially open area leading to the Denver Performing Arts Complex (DPAC), were not public fora. *Hawkins*, 170 F.3d at 1287-88. In reaching that holding, we reasoned

> [t]he Galleria does not qualify as a traditional public forum, for it is *not . . . analogous to a public right of way or thoroughfare. The Galleria does not form part of Denver's automotive, bicycle or pedestrian trans-*

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[9] Although the City and Church argue the easement does not meet the legal definition of "sidewalk" and therefore should not be referred to as such, the label is not dispositive. In addressing whether the walkways at issue in *Kokinda* were public fora, the Supreme Court made no distinction between "sidewalk" and "walkway." *See, e.g., United States v. Kokinda*, 497 U.S. 720, 727-29, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990); *see also Greer v. Spock*, 424 U.S. 828, 830-36, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (referring to "public streets" within military reservation). The plurality's public fora determination in *Kokinda* turned instead on the nature and purpose of the sidewalks. *See Kokinda*, 497 U.S. at 727-29, 110 S.Ct. 3115 (plurality opinion) (post office "sidewalk" is nonpublic forum). Therefore our analysis does not depend on whether the walkways are properly referred to as "sidewalks," but on the purpose to which they are dedicated.

> *portation grid,* for it is closed to vehicles, and *pedestrians do not generally use it as a throughway to another destination.* Rather, the Galleria's function is simply to permit ingress to and egress from the DPAC's various complexes.

Id. at 1287 (emphasis added). Similarly, a plurality of the Supreme Court held in *Kokinda* that the sidewalks leading to a post office were not public fora because they led only from the post office parking lot to the post office building, and their sole purpose was to provide ingress and egress to the post office. *Kokinda*, 497 U.S. at 727, 110 S.Ct. 3115 (plurality opinion of O'Connor, J.) ("[t]he postal sidewalk at issue does not have the characteristics of public sidewalks" because it is not a "public passageway" or "thoroughfare" but "leads only from the parking area to the front door of the post office . . . [and] was constructed solely to provide for the passage of individuals engaged in postal business."); *see also Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (streets and sidewalks on military reservation are not public fora because they are entirely within the compound and the military has unquestioned authority to control activity on military bases); *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir.1998) (sidewalks on the pier are not traditional public fora because they "are not through routes; they lead only to the pier facilities themselves.").

The purpose of the easement in this case is for pedestrian passage, it forms part of the downtown pedestrian transportation grid, and it is open to the public. The easement therefore shares many of the most important features of sidewalks that are traditional public fora. This similarity is a persuasive indication that the easement is a traditional public forum. *See ISKCON*, 505 U.S. at 698-99, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment) (whether property shares physical similarities with traditional public forums is

one of most important factors in defining public fora); *see also Frisby*, 487 U.S. at 480, 108 S.Ct. 2495 ("'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.") (quoting *Hague*, 307 U.S. at 515, 59 S.Ct. 954 (Roberts, J., concurring)); *Grace*, 461 U.S. at 177, 103 S.Ct. 1702 ("public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more,* to be public forums." (quotation and citation omitted) (emphasis added)). The easement here is thus better compared to the easement which the Ninth Circuit held was a public sidewalk, and therefore a traditional public forum, in *Venetian Casino*, 257 F.3d at 944 ("[T]he sidewalk is used to facilitate pedestrian traffic along the Las Vegas strip generally and not merely to provide access to the Venetian for its patrons.").

We also consider whether speech activities are compatible with the purpose of the easement. *See ISKCON*, 505 U.S. at 698-99, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment). In doing so, we presume the availability of reasonable time, place, and manner restrictions, so we do not consider "theoretical incompatibilities" that could be avoided. *Id.* at 699, 112 S.Ct. 2701. Moreover, it is the purpose of the easement, the property that is a forum of some type, and not the purpose of the Church plaza, the surrounding property, that is at issue.[10]

Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage. *See, e.g., ISKCON*, 505 U.S. at 686, 112 S.Ct. 2701 (O'Connor, J., concurring) (determining whether

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[10] In this respect, the district court erred in considering whether speech activities were compatible with an "ecclesiastical park." Providing for a religious park is the purpose of the surrounding plaza property, not the easement, and must be the Church's purpose, rather than the City's.

airport is public forum by examining whether public access is "inherent" in the open nature of the location). Given that the easement shares most of the characteristics of a traditional public sidewalk, which is an "archetype" public forum, *Frisby*, 487 U.S. at 480, 108 S.Ct. 2495, it is implausible that *all* speech activities (which is what the City purports this easement prohibits) would practically interfere with the use of the easement for pedestrian passage. *See, e.g., Lederman v. United States*, 291 F.3d 36, 43 (D.C.Cir.2002) ("If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers . . . then we assume they are also capable of circumnavigating the occasional protester."). We also note the City itself first proposed requiring the Church to regulate speech on the plaza no more restrictively than a public park. In short, it is evident that the use of this property, which is similar to a traditional public sidewalk, is compatible with expressive activities.

The City and Church assert any expressive conduct by the public would interfere with the character of the surrounding private property, the Church's private property rights on the easement, and the Church's own ability to communicate. Protecting the Church's expression from competition is not a legitimate purpose of the easement or its restrictions, so we do not consider its compatibility with speech. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-87, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (requiring shopping center owner to permit public speech does not infringe on owner's free speech rights). With respect to the other arguments, to the extent they relate to the purpose of the easement rather than the surrounding property, the effects of expressive activity such as congestion, noise, and disruption within reasonable limits are the necessary cost of securing our First Amendment freedoms and these effects must be tolerated to a reasonable extent. *ISKCON*, 505 U.S. at 701, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment) ("The First Amendment is often inconvenient. But that is beside the point.

Inconvenience does not absolve the government of its obligation to tolerate speech."). Therefore, although a government may always enforce, at a minimum, reasonable time, place, and manner restrictions on public expression, a desire for peace and order does not support a conclusion that a public space such as this is not a public forum.[11]

Finally we consider the history of the property. Whether property has traditionally been open to public use is a factor indicating the property is a public forum, although this is not determinative. *See Grace*, 461 U.S. at 179, 103 S.Ct. 1702. The property here is undisputedly open to public use.

A more important factor is whether the property has traditionally been the site of expressive activities by the public. *See Forbes*, 523 U.S. at 677, 118 S.Ct. 1633 (factors such as "whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate'" determine whether property is public forum) (quoting *Perry*

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[11] In this regard, having determined that the easement warrants the application of First Amendment principles, and recognizing it has the characteristics of traditional public sidewalks, we do not believe the special nature of this particular pedestrian passageway—that it traverses private property rather than abuts a public street—defeats its status as a public forum. The Supreme Court has made clear that once an "archetype" of a public forum has been identified, it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected forum. *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). The Court rejected the argument that public streets that are narrow and located in quiet residential neighborhoods are therefore not public fora, stating "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora." *Id*; *see also ISKCON*, 505 U.S. at 697, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment) ("open, public spaces and thoroughfares that are suitable for public discourse may be public forums, . . . without concern for a precise classification of the property."); *Grace*, 461 U.S. at 177, 103 S.Ct. 1702 (sidewalks are normally public fora "without more").

Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. 948); *Grace*, 461 U.S. at 178, 103 S.Ct. 1702 (areas traditionally held open for expressive activities are normally public fora). The government previously permitted public expression in this area when it was a public sidewalk abutting Main Street, but it has not ever permitted public expression on the easement. We give no weight to the fact that the government has not "traditionally" permitted speech activities since it sold the property and retained the easement. Where courts have considered the traditional use of publicly accessible property for speech, they have refused to attribute legal significance to an historical absence of speech activities where that non-speech history was created by the very restrictions at issue in the case. *See Grace*, 461 U.S. at 180, 103 S.Ct. 1702 ("Government may not by its own "*ipse dixit*" destroy public forum status"); *Lederman*, 291 F.3d at 43 ("restrictions cannot bootstrap themselves into validity by their mere existence" (quotation, citation and emphasis omitted)). This is particularly true where the property was a public forum before the government restrictions were put in place. As the Supreme Court stated in *Grace*,

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts [ ] property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.

Grace, 461 U.S. at 180, 103 S.Ct. 1702.

This raises the issue of the relevance of the easement's prior history, as public sidewalks, to our analysis. The plaintiffs argue, more generally, that the easement remains a public forum precisely because the property was previously a

public forum and it has not been sufficiently altered to destroy that status. The City and Church contend significant changes in the physical characteristics and use of the property have eliminated any prior public forum. The mere fact that a space is on what used to be a public street does not automatically render it a public forum. *See Hawkins*, 170 F.3d at 1287 ("'In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.'" (quoting *ISKCON*, 505 U.S. at 699-700, 112 S.Ct. 2701) (Kennedy, J., concurring in judgment)).

The district court concluded that both the physical characteristics and the principal use of the property had been altered sufficiently to eliminate the previous public forum. We disagree that the principal use of the easement has changed. As we previously stated, the district court considered the religious purpose of the plaza when it should have considered the purpose of the easement. The purpose of the easement is to provide a pedestrian throughway that is part of the city's transportation grid, and in this respect it is identical to the purpose the sidewalks along that portion of Main Street previously served. Similarly, to the extent the walkways provide access to the Church facilities as an end destination for tourists, which is another stated purpose of the easement, the former sidewalks along Main Street similarly provided tourists with the means of accessing portions of the Church campus open to them. In *Hawkins*, the court found that the walkways had changed sufficiently not only because they served a different purpose—ingress and egress to the DPAC facilities—but also because their physical nature was different, that is, they dead-ended at DPAC rather than remaining part of the city's pedestrian grid. *Id.* Here, while certain physical characteristics of the walkways have changed, they are still intended to provide passage through, not to, Church property.

As stated above, a pedestrian throughway was the primary purpose to which the City expressly dedicated the easement. The previous public street and sidewalks provided access between these two city blocks, were part of the city's transportation grid, served this function in a central downtown location, and were highly desirable because of the large size of city blocks in downtown Salt Lake City. It was clearly the intent of the City to retain these aspects of the previous space with respect to pedestrians. In addition, the ordinance approving the street closure required an easement "planned and improved to *maintain . . . public use*." Aplt.App. vol. II at 401 (emphasis added). The City therefore deliberately retained the pedestrian throughway that existed before it closed the street.

In retaining the easement, the City not only retained the most important functions of the property, but also the functions most often associated with speech activities. *See, e.g., Hawkins*, 170 F.3d at 1288. Thus, while the government has the power to change the status of a forum, "when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, *and bear the attendant costs*." I*SKCON*, 505 U.S. at 700, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment) (emphasis added); *see also Hawkins*, 170 F.3d at 1287-88 (to eliminate public forum state must alter physical characteristics and bear attendant costs) (quotation and citation omitted). We are convinced the City has attempted to change the forum's status without bearing the attendant costs, by retaining the pedestrian easement but eliminating the speech previously permitted on the same property. In effect, the City wants to have its cake and eat it too, but it cannot do so under the First Amendment.

"As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, 497 U.S. at 737-38, 110 S.Ct. 3115 (Kennedy, J., concurring

in judgment). We think this is particularly true with respect to downtown public spaces conducive to expressive activities. The prior history of the easement here is highly relevant to whether the property has traditionally been open to public speech. Because the property was a public forum prior to the sale, we conclude the retained easement has traditionally been open to speech activities.

In sum, the easement's history, as well as the other contemporary characteristics of the easement discussed above, support the conclusion that the easement is a public forum. The objective nature and purpose of the easement and its similarity to other public sidewalks indicate it is essentially indistinguishable from other traditional public fora. We reach this conclusion in spite of the City's express intent not to create a public forum, because the City's declaration is at odds with the objective characteristics of the property and the City's express purpose of providing a pedestrian throughway. Accordingly, we hold that the easement is a public forum.

C.

We turn to whether the restrictions on speech activities on the easement are valid. In a traditional public forum, the government's power to restrict expressive conduct is "very limited." *Grace*, 461 U.S. at 177, 103 S.Ct. 1702.

> For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. 948 (citation omitted). In public fora, "the government may not prohibit all communicative activity." *Id.*

The "restrictions" here virtually ban speech because, as we pointed out above, the City and LDS Church maintain that the public has no speech rights whatsoever on the easement except as the Church may permit, which amounts to the same thing. As such, the restrictions are invalid. *Id.* The Supreme Court has held such broad bans invalid even under a non-public forum analysis. *See Bd. of Airport Comm'rs*, 482 U.S. at 574-75, 107 S.Ct. 2568 (invalidating ban on all "First Amendment activity" at LAX airport). As Justice O'Connor wrote for a unanimous court:

> On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. Instead, the resolution . . . prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.

Id. at 574-75, 107 S.Ct. 2568. The City has similarly attempted to create a "First Amendment Free Zone" on the easement and this attempt too must fail.

The City contends that acquiescing to the LDS Church's demand to control speech on the easement was necessary to obtain the Church's agreement to buy the property. That may be true, but the City may not exchange the public's constitutional rights even for other public benefits such as the revenue from the sale, and certainly may not provide a public

space or passage conditioned on a private actor's desire that that space be expression-free. The City must "'bear the attendant costs.'" *Hawkins*, 170 F.3d at 1288 (quoting *ISKCON*, 505 U.S. at 700, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment)). If it wants an easement, the City must permit speech on the easement. Otherwise, it must relinquish the easement so the parcel becomes entirely private.

The City and Church maintain they may legitimately seek to protect the Church and the sanctity of its property from public speech. This is true to a certain extent. As with any public forum, the City may enact reasonable time, place, and manner restrictions. *See Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. 948. Governments routinely pursue public objectives in regulating the time, place and manner of speech on public fora without running afoul of the Constitution. Such legitimate objectives include public safety, accommodating competing uses of the easement, controlling the level and times of noise, and similar interests. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 792, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (government desire to "retain the character of the [park] . . . and to avoid undue intrusion into residential areas and other areas of the park" justify noise level restrictions in public park); *Frisby*, 487 U.S. at 484-86, 108 S.Ct. 2495 (interest in "residential privacy" justifies ban on targeted picketing of particular houses). Thus while the purpose of the forum is a pedestrian easement, the City may take the interests of surrounding property owners into account in enacting regulations, and may seek to accommodate competing uses of the easement.

We are not insensitive to the multitude of activities that occur in any downtown setting and the competing property uses at issue here, particularly given that the Church is the primary anchor of interestin the property. But the City may not take action that runs afoul of our first and primary amendment. Our Country's dedication to both free expression and non-Establishment are among its greatest heritages,

and our fealty to the concept of a marketplace of ideas in religion as well as other fields has been the hallmark of our society. Moreover, we remind the City that "[t]he First Amendment is a limitation on government, not a grant of power." *ISKCON*, 505 U.S. at 695, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment). The City's attempt to create a public throughway but withhold speech rights on that throughway is ineffectual simply because the City has attempted to exercise power the First Amendment does not afford.

III

Because we hold the easement restrictions invalid, we need not reach the plaintiffs' remaining federal or state claims. The LDS Church does, however, raise two further arguments we must address. The Church asserts that granting the relief plaintiffs' request would entangle the City in joint administration of the easement with the Church in violation of the Establishment Clause. We are not persuaded. We hold here that the City, not the Church, has responsibility for regulating speech on the easement. While the City may legitimately accommodate the unique location and setting of the easement, to the extent the City overly involves the Church in that regulation it will run afoul of the limits on its actions we announce today.

The LDS Church also claims that permitting public speech on the easement would infringe on the Church's right of free expression. We also reject this contention because the Church has no First Amendment right to be protected from public speech. The speech of others does not, as a matter of law, infringe on an individual's own free speech rights. *See PruneYard Shopping Center*, 447 U.S. at 85-87, 100 S.Ct. 2035 (free speech rights of shopping mall owner not infringed upon by state law requiring owner to permit speech in mall).

Our conclusions in this case do not depend on any facts in dispute. Accordingly, summary judgment for plaintiffs is appropriate. *ZJ. Gifts D-2, LLC*, 136 F.3d at 685 (citing *Dickeson*, 844 F.2d at 1444-45 n. 8). Plaintiffs are entitled to declaratory and injunctive relief with respect to the ban on expressive conduct on the easement.

IV

For the reasons stated above, we REVERSE the judgment of the district court and REMAND with instructions to enter judgment for plaintiffs consistent with this opinion.[12]

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[12] Appellee's "Motion to Strike" filed August 27, 2001, by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints is denied.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. UTAH, CENTRAL DIVISION.

No. 2:99-CV-912-ST.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY; Utahns for Fairness; Utah National Organization for Women and Craig S. Axford,

Plaintiffs,

v.

SALT LAKE CITY CORPORATION, a Municipal Corporation,

Defendant,

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,

Intervenor.

May 4, 2001

ORDER GRANTING DEFENDANT'S AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STEWART, District Judge.

This matter came before the court on January 2, 2001, for hearing on Defendant City's and Intervenor's Motions for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment.

I INTRODUCTION

Plaintiffs want the right to stage demonstrations for the expression of their political and religious beliefs on property that was formerly Main Street between South Temple and North Temple and is now a privately-owned Church Plaza. Defendant City sold the disputed property (the Property) to the Intervenor, which now owns and maintains a Church Plaza on the Property. Plaintiffs seeks declaratory and injunctive relief that restrictions on the use of the City's retained pedestrian easement across the Church Plaza violate their rights under the First Amendment and to Equal Protection under the federal constitution and under the Establishment clauses of the U.S. and Utah constitutions. The parties all move for summary judgment. The court finds no material issues of fact and grants summary judgment against Plaintiffs and in favor of the City and the Intervenor.

II

Plaintiffs are the Unitarian Church, the Utah National Organization of Women, Utahns for Fairness and an individual, Craig Axford. The defendant is Salt Lake City corporation, seller of the surface rights to the portion of Main Street located between South Temple and North Temple. Intervenor is the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints (CPB), purchaser of the Property. The CPB is the property-holding corporation that conducts the temporal affairs of the Church of Jesus Christ of Latter Day Saints (LDS Church).

The Property consists of a parcel formerly containing the street and sidewalks of Main Street, between North Temple and South Temple streets. The Property is located between two city blocks owned by the CPB. The block to the west of the disputed Property is the well-known Temple Square, site of buildings of religious and historic interest. The block to the east is known as the Church Administration Block and contains buildings housing administrative functions of the

LDS Church as well as buildings of historic interest. CPB's Ex. 5 Nielsen Aff. ¶ 7 and Maps 3, 5 and 6.

On April 13, 1999, the Salt Lake City Council, in a 5-2 vote, passed Ordinance No. 28 of 1999, which authorized the sale of the surface rights for the Property pursuant to several conditions and the Warranty Deed, including a pedestrian easement, as agreed to by the CPB and the City. In order to sell the surface rights to CPB for the express purpose of allowing CPB to build the Church Plaza, defendant City closed the portion of Main Street that formerly occupied the Property. Previously, in 1993, the CPB or the LDS Church acting through Reserve Property Inc., purchased the subsurface rights to the Property for the purpose of building a parking garage and held a right of first refusal for the surface rights. A parking garage was built under the Property shortly before construction began on the Church Plaza in May 2000. The Church Plaza was dedicated in October 2000.

On April 27, 1999, the City, acting through the Mayor, executed the Special Warranty Deed which contains a reservation of easement for pedestrian use. The Warranty Deed also preserves for the City an uninterrupted view corridor over the Property, a right of reverter, plus emergency and public safety easements and easements for public and private utilities.[1]

The Property's $8.124 million purchase price is the full market value without any reduction for the City's reserved easements, right of reverter or preservation of the view corridor. Cordova Aff. ¶¶ 18 and 20.

The pedestrian easement (hereinafter "easement") is expressly limited to pedestrian access: "an easement over and across the surface of the Property for pedestrian [2] access

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[1] These easements are not at issue in this case.

[2] Bicycles and leashed dogs may be walked across the pedestrian easement; skate boards, roller blades and roller skates are not allowed. Special Warranty Deed at § 1.3.

and passage only;" provides the Property shall be available for access for such pedestrian "access and passage at all times, both day and night," and provides no perimeter fences shall be erected on the North or South Temple right of way. Special Warranty Deed at § 1.3. The easement provides the City (the Grantee) "may allow the general public to use this easement for pedestrian access and passage only" but all such use is subject to several conditions, which conditions form the basis of this lawsuit. *Id.* The Warranty Deed contains integration and severability clauses and specifically provides that the pedestrian easement can be modified or terminated by written agreement of the City and the landowner (CPB).

The Warranty Deed provides the pedestrian easement is expressly subject to the following conditions as follows:

> 2. *Conditions, Limitations and Restrictions.* Notwithstanding anything to the contrary in this instrument, the easements reserved herein are subject to the following conditions, limitations and restrictions:
>
> * * * * * *
>
> 2.2 *Right to Prevent Uses Other Than Pedestrian Passage.* Nothing in the reservation of use of this easement *shall be deemed to create or constitute a public forum, limited or otherwise* on the Property. Nothing in this easement *is intended to permit any* of the following enumerated or similar activities on the Property: *loitering, assembling,* partying, *demonstrating, picketing, distributing literature,* soliciting, begging, littering, consuming alcohol beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), *erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any* illegal, *offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct,* or otherwise disturbing the peace. Grantee *shall have the right to deny*

access to the Property to persons who are disorderly or intoxicated or *engaging in any of the activities identified above.* The provisions of this section are intended to apply only to Grantor and other users of the easement and *are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.*

2.3 *Right to Exclude Habitual Violators.* Grantee may prohibit and *lawfully prevent access to the Property by individuals who:* (a) have threatened or intentionally caused harm to leaders or members of the Church of Jesus Christ of Latter-day Saints; (b) have threatened or intentionally caused damages to buildings or property owned or used by the Grantee or by the Church of Jesus Christ of Latter-Day Saints; or (c) *have on more than one previous occasion entered on the Property and engaged in activities identified in section 2.2* above.

3. Enforcement. *Grantee may use all lawful means available to owners of private property to prevent any uses of the easements which are contrary to the provisions of this instrument.*

Warranty Deed 1-3 (underlining in original, italicized emphasis added).

III

A.

Plaintiffs seek declaratory judgement that the walkway areas of the Property are, like the city sidewalks formerly on the Property, a public forum where expression is protected by the First Amendment. They contend that despite the sale the walkways retain their status as a public forum and the City and the CPB could not alter that status by sale or by "fiat."

Plaintiffs contend that the restrictions in the pedestrian easement contained in the Warranty Deed violate their rights under the state and federal constitutions and various federal civil rights statutes. Plaintiffs bring the following claims:

B. First Claim—First Amendment

Plaintiffs' First Claim is based upon the First Amendment protections for freedom of expression and association. Plaintiffs contend that the Property remains a public forum where their right to expression may not be restricted; that the provisions of the pedestrian easement are facially invalid restrictions on their ability to engage in expression on the Property; that the restrictions are vague, arbitrary and discriminatory; that the restrictions are government-sanctioned content and viewpoint discrimination because the restrictions favor the LDS Church and its beliefs and opinions. Plaintiffs contend the restrictions violate the First Amendment as made applicable by the Fourteenth Amendment; the Civil Rights Act of 1871 and 42 U.S.C. §§ 1983 and 1988.

C. Second Claim—Establishment Clause

Plaintiffs contend the City is violating the Establishment Clauses of the First Amendment of the U.S. Constitution and the Utah Constitution (Article 1, Section 4) and 42 U.S.C. §§ 1983 and 1988, by its conduct in allegedly: authorizing the CPB to prohibit speech it finds offensive while simultaneously allowing the CPB unfettered use of the Property to promulgate is own message; authorizing the CPB unbridled discretion over which members of the public will be allowed to use the public easement, an alleged traditional state function; endorsing the LDS Church, and entangling the same in governmental functions without secular purpose; purporting to dedicate a park-like public forum for the exclusive control of a religious organization; unconstitutionally blurring the distinction between church and state property giving the

impression that the LDS Church occupies a privileged position and that the City endorses that Church's messages.

D. Third Claim—Equal Protection

Plaintiffs contend the City violated their constitutional rights to equal protection of the laws under the First, Fifth and Fourteenth Amendments of the U.S. Constitution, the Utah Constitution (Article 1, Section 24) and 42 U.S.C. §§ 1983 and 1988 by imposing or allowing imposition of vague, arbitrary and discriminatory restrictions on the public's right to use the Property while simultaneously allowing the CPB and those of whom it approves unrestricted access. Plaintiffs contend that the restrictions are not related to and do not serve any compelling or substantial state interest, and constitute invidious discrimination with the purpose and effect of disfavoring Plaintiffs' speech in favor of that of the LDS Church. In addition, Plaintiffs contend that their rights to engage in lawful conduct on the Property pursuant to the easement is subject to the invidious discrimination "through the administrative and legal machinations of the City government." This last position is a reference to Plaintiff's position that the restrictions in the easement were somehow sneaked by the public in order to obtain approval for the sale.

E. Relief Sought

Plaintiffs seek injunctive and declaratory relief, basically the same relief for each claim. Plaintiffs seek an injunction as follows; an injunction against Defendants violating their constitutional rights; and, an injunction prohibiting the CPB from enjoying exclusive control and use of the Property for its own expressive purpose until and unless Plaintiffs are granted equal access and equal rights to use the Property.

Plaintiffs additionally seek declaratory judgment that the Property is a public forum; that the City has violated Plaintiffs' constitutional rights regarding the alleged public forum; that the restrictions in the deed/easement violate their

constitutional rights by discriminating on the basis of content/viewpoint and are therefore null and void; and, that Defendant is required to promulgate and administer reasonable constitutionally permissible regulations on access to and enjoyment of the Property. Plaintiffs also seek attorneys fees and costs.

IV

Plaintiffs contend a condition known as Condition 15, proposed by the Salt Lake Planning Commission (an advisory board), was deleted from the terms of the sale without adequately informing the public that it would not be a condition of sale. Condition 15 would have required that "there be no more restrictions on the use of the space that are more restrictive than is currently permitted at a public park." In 2000, the City Council passed Ordinance No. 29 of 2000, which clarified the Council intended to exclude Condition 15 from the deed. This action mooted a separate lawsuit regarding the Property by plaintiff Axford.

Although the Plaintiffs make much of the facts leading up to the sale, the Intervenor is correct that those facts are not relevant to the issues of summary judgment on Plaintiff's claims. Therefore, to the extent the facts leading up to the sale are disputed, they are not material. What is material in this challenge to the restrictions in the pedestrian easement is the language of that easement and the nature of the Property to which that language is applied.

V

Each party brings a summary judgment motion. The standard on summary judgment is well-known:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, we

> examine the factual record and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Bullington*, 186 F.3d at 1313.
>
> As the moving parties, defendants shoulder the "initial burden to show that there is an absence of evidence to support the nonmoving party's case." *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir.1995) (internal quotation marks and citation omitted). If defendants meet this burden, it falls to plaintiff to "identify specific facts that show the existence of a genuine issue of material fact." *Id.* "The party opposing the motion must present sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor." *Id.* (internal quotation marks and citation omitted).

Clinger v. New Mexico Highlands Univ. Bd. of Regents, 215 F.3d 1162, 1165 (10th Cir.2000).

> An issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *See id.* If a party that would bear the burden of persuasion at trial does not come forward with sufficient evidence on an essential element of its prima facie case, all issues concerning all other elements of the claim and any defenses become immaterial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) . . . .

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670-71 (10th Cir.1998)

The court will address the summary judgment motions in connection with each of Plaintiffs' three claims. However, the court must first address ripeness.

VI

The easement restrictions at issue have not yet been enforced or applied by Property owner CPB or Defendant City. The parties have not raised an issue of whether there is a case or controversy that is ripe for decision. *See Capital Bonding Corp. v. New Jersey Supreme Court*, 127 F.Supp.2d 582, 597 (D.N.J.2001) ("Ripeness is a prerequisite to all federal actions, including those for declaratory or injunctive relief, and is sufficiently important that courts are required to raise the issue *sua sponte* even though the parties do not."). Thus, the court must examine the issue of ripeness *sua sponte* despite the parties' desire to have a constitutional issue decided.

> In order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy. "[R]ipeness is peculiarly a question of timing," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in "'clean-cut and concrete form.'" *Renne*, 501 U.S. at 322[, 111 S.Ct. 2331] (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947)).
>
> As a general rule, determinations of ripeness are guided by a two-factor test, "'requiring us to evaluate both the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.'" *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir.1990) (quoting *Abbott Labs.*, 387 U.S. at

149[, 87 S.Ct. 1507]). In determining whether an issue is fit for judicial review, the central focus is on "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Wright, Miller & Cooper, Federal Practice & Procedure, § 3532 at 112. To this end, courts frequently focus on whether a challenged government action is final and whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed. *See Sierra Club*, 911 F.2d at 1415; *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495 (1st Cir.1992). In assessing the hardship to the parties of withholding judicial resolution, our inquiry "'typically turns upon whether the challenged action creates a "direct and immediate" dilemma for the parties.'" *El Dia*, 963 F.2d at 495 (quoting *W.R. Grace & Co. v. United States EPA*, 959 F.2d 360, 364 (1st Cir.1992)).

The customary ripeness analysis outlined above is, however, relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought. *E.g.*, *ACORN*, 835 F.2d at 739. Thus, while it is true that "the mere existence of a statute . . . is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms," *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1110 (D.C.Cir.1969), in the context of a First Amendment facial challenge, "[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim," *Martin Tractor*, 627 F.2d at 380. The primary reasons for relaxing the ripeness analysis in this context is the chilling effect that

potentially unconstitutional burdens on free speech may occasion:

> First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any *inhibiting chill*.

13A Wright, Miller & Cooper, Federal Practice and Procedure § 3532.3 at 159, *see also ACORN*, 835 F.2d at 740.

> Thus, our ripeness inquiry in the context of this facial challenge to New Mexico's election law statute focuses on three elements: (1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review. Our ripeness inquiry is not to be applied mechanically but rather, with flexibility, *Sierra Club*, 911 F.2d at 1416.

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499-1500 (10th Cir.1995) (underlined emphasis added and citations partially deleted).

On the issue of ripeness, it is important to note the types of activities the Plaintiffs want to conduct on the Property. Plaintiff Unitarian Church wants to pursue its objectives of spiritual enlightenment and social justice for all regardless of status such as race, gender, disability and sexual orientation, through "public dialogue and demonstrations." It contends some of its members have been previously escorted from unspecified CPB Property for such activities and therefore it reasonably fears they will be barred temporarily or permanently from use of the public easement. First Amended Complaint at ¶ 4.

Plaintiffs Unitarian Church and Mr. Axford also contend they will be forced to avoid the easement because using it will expose them to the sight of unwelcome governmentally-endorsed religious messages. First Amended Complaint at ¶ 4.

Plaintiff Utahns for Fairness wanted to use the Property in 1999 to hold a silent protest by encircling Temple Square with persons holding hands, including the disputed Property sold to CPB and now used as the Church Plaza. First Amended Complaint at ¶ 20 and Wood Dep. at 27 (attached to Pl.'s Opposition to Defendant's and Intervenor's Motions) (Mr. Wood is the member of plaintiff Utahns for Fairness who organized the protest) and Wood Dep. at 12 and 43 (CPB's Ex. 2).

Plaintiff National Organization of Women, (NOW), alleges it has demonstrated on the disputed Property in the past and wishes to do so in the future. First Amended Complaint at 6 and CBP's Ex. 68 (Malin Dep. at 6) (Ms. Malin was NOW's President/coordinator at the time of filing suit).

All of the Plaintiffs say they wish to use the Property to demonstrate, to espouse and to express their messages on an equal basis with the LDS Church. Plaintiffs have submitted evidence that they will be unable to do so because of the easement's restrictions.

Thus, this facial First Amendment challenge to the easement's bans against demonstrating, assembling, picketing, distributing literature, erecting signs or displays, using devices to project spoken messages or music is ripe because the bans create a "direct and immediate dilemma" for Plaintiffs that could place an "inhibiting chill" on their First Amendment right to free speech. *New Mexicans for Bill Richardson*, 64 F.3d at 1499-1500.

However, claims based upon the possible future enforcement of the "offensive, indecent, vulgar, lewd or disorderly speech, dress or conduct" provision of section 2.2 and the

"Right to Exclude Habitual Violators" provision of section 2.3 of the easement may not be ripe (*see* below).

VII Summary Judgment on First Amendment Claim

The parties agree that the sidewalks of Main Street were a public forum before the sale and as a result, the First Amendment protected the exercise of free speech thereon. See e.g. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420, (1988)("wherever the title of streets may rest, they have immemorially been held in trust for the use of the public" and finding streets don't lose character as public forums because they are in a suburb) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423(1939)); *U.S. v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (government may not transform the character of otherwise ordinary and publicly owned sidewalk by including it a statutory definition of publicly owned property that is not public forum). However, although all parties recognize that the sidewalks on the Property were formerly a traditional public forum, the parties strongly dispute the effect of the sale and reserved pedestrian easement on the previously-existing right to exercise First Amendment freedoms on the Property.

The CPB moves for Summary Judgment because it contends the public forum was lawfully closed when the sale of the Property closed the street, transformed the physical character of the Property and changed its principal use. In support, the CPB cites the Tenth Circuit's case *Hawkins v. City and County of Denver*, 170 F.3d 1281 (10th Cir.1999). The CPB contends that because the Property is now privately owned for a religious purpose, the Property is not a speech forum of any type subject to the constitutional restraints claimed by Plaintiffs.

The City moves for Summary Judgment on the basis that upon closure and sale the traditional public forum was altered, amended and vacated by changing the character, nature and use of the Property; that the retention of a

pedestrian easement did not preserve a public forum status where the agreement between the parties provided otherwise, and that private property is not burdened by public forum status. The City, like Intervenor CPB, relies upon the Tenth Circuit's *Hawkins* case. The City specifically addresses the freedom of association portion of Plaintiffs' complaint contending that there is no right to associate on private property belonging to another.

Plaintiffs move for partial summary judgment. They contend the undisputed facts show that the Property includes thoroughfare sidewalks that are a public forum, that the restrictions to which the City agreed cannot constitutionally be enforced, and, they seek a declaration that the restrictions are void. Plaintiffs contend this is a situation where the Property's status as a public forum continues despite the sale and the Warranty Deed's declaration that the sale doesn't create a public forum. Plaintiffs rely on the line of cases beginning with the "company town" case, *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (constitutional restrictions applied to a privately owned town which performed public functions "traditionally the exclusive prerogative of the State"). They also rely on such cases as *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (Court disregarded sham transfer of a City Park made to avoid prohibitions against racial segregation by government); *Citizens to End Animal Suffering v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D.Mass.1990) (public forum status of property remained despite its lease to a private corporation); and *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F.Supp.2d 1027 (D.Nev.1999) (sidewalk adjacent to casino on private property enjoyed public forum status).

The *Hawkins* case is the controlling legal authority. *Hawkins* instructs that government may close a First Amendment public forum by *inter alia*, selling the property,

changing its "physical character" or "principal use." 170 F.3d at 1287-88.

> Moreover the fact that the Galleria was constructed on what used to be a public street does not render it a traditional public forum. The government may, by changing the physical nature of the property, alter it to such an extent that it no longer retains its public forum status. *See ACLU of Nevada v. City of Las Vegas*, 13 F.Supp.2d 1064, 1074-75 (D.Nev.1998). As stated by Justice Kennedy in his *Lee* concurrence:
>
> > In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.

Hawkins, 170 F.3d at 1287 (citing Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699, 112 S.Ct. 2711, 120 L.Ed.2d 541 (1992) (challenge to Port Authority's ban on distribution of literature in airport)) (citations partially omitted).

This case is a stronger case than *Hawkins* for the closure of the former public forum because in this case the City sold the Property for its full market value while in *Hawkins* the City and County of Denver continued to own the property with only some small parts leased to private business.

It is undisputed in this case that the new property owner, CPB, now has total responsibility for the maintenance of the Property. This fact alone distinguishes the case from *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), cited by Plaintiffs for the proposition that a city can't "strip" the nature of a public forum and its protections of First Amendment rights by simply selling the Property or intending to end the public forum status. In *Evans*, the City at issue transferred record ownership, in the form of changing trustees, to a city park, while continuing to maintain and control the property. The Supreme Court held that if "the

municipality remains entwined in the management or control of the park, it remains subject to the constraints of the Fourteenth Amendment." 382 U.S. at 301, 86 S.Ct. 486. In this case, there is no allegation that the City continues to be involved in the maintenance [3] or the operation of the Property or other facts[4] to show *Evans* is applicable.

Turning to the issue of whether the public forum was closed by changing its physical character, Intervenor CPB has produced evidence that the physical character of the Property has been materially altered. It is undisputed that the old sidewalks were destroyed and the new walkways are different from, and are in different places than, the former city sidewalks. It is undisputed that the area where the walkways were is now in a landscaped ecclesiastical park. Upon entering the Church Plaza, the walking surface turns abruptly to distinct "reddish-grey granite pavers." CPB's Ex. 5 at ¶ 19. There are security bollards (posts) at each entrance to prevent motor traffic from entering the Church Plaza. *See* Bauer Aff. Ex. I. The bollards, street lights and garbage cans are identical to those used on the adjacent Temple Square and Church Administration Block and the nearby Conference Center. Ex. 4 at 30. The Church Plaza's entrances are marked by large planters placed on large stone structures containing waterfalls. *Id.* Exs. C, D, G, I & M and CPB Ex. 5 at ¶ 21. Unlike the cases where the walkways are identical to the public sidewalks surrounding and attached to them, in this case, as in *ACLU v. City of Las Vegas*, 13 F.Supp.2d 1064, (D.Nev.1998), all of the surroundings alert the pedestrian that

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[3] Cost of construction of the Church Plaza, its underground parking garage and the estimated $200,000 annual maintenance costs for the Church Plaza are the exclusive responsibility of the CPB as property owner. CPB Ex. 4 at ¶ 23.

[4] Further, as noted below, the Property was purchased for and is operated as an ecclesiastical park, designed and used to further religious purposes. This distinguishes the Property from the traditional public park-like nature of the property in *Evans* or *Faneuil Hall*.

he or she has entered an enclave that is distinct from the public area. As in *ACLU*, there is distinctive paving, special lighting, and landscaping. Further, it is undisputed that there are identifying signs at the entry of the Church Plaza and there are religious statuary and symbolism throughout the Church Plaza, all of which alert the pedestrian to the religious theme of the area. *E.g.* CPB Ex. 4 at ¶¶ 28-30 and Ex. 5 at ¶¶ 20-22.

It is undisputed that a major component of the Church Plaza is the large reflecting pool designed to reflect and enhance the Salt Lake LDS Temple (Temple), a building of religious purpose which is located on the adjacent Temple Square. Ex. 5 at 27. There are grade elevations, grassy areas, and distinctive plantings distinguishing the Church Plaza from nearby areas. *Id.*

In opposition, Plaintiffs have produced evidence that the Church Plaza was designed with pedestrian traffic in mind. Plaintiffs' evidence includes the pictures and drawing attached to the Affidavit of Robert Bauer showing unblocked pedestrian access along the North to South edges of the Church Plaza, although the access curves gently around the reflecting pool and planters. However, these pictures also show clearly the "enclave" nature of the Church Plaza. As revealed in those pictures, any pedestrian could not fail to understand that he or she is not walking on the public sidewalk of that part of the City but is instead crossing a private Church Plaza. *See Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 273 (Colo.1997) (holding governmentally owned sidewalks leased by private entity were public forum where the "architectural design and layout of the sidewalks and walkways fail to indicate to the public that they have entered a private area.").

Where the undisputed facts show the nature of the Property has been changed so that the Church Plaza is clearly distinguishable from the surrounding streets and sidewalks,

the Plaintiffs have not raised an issue of fact that its physical character has not been so materially changed as to end its status as a public forum sidewalk.

Hawkins also holds that a public forum can be closed by changing its principal use. In this respect the Intervenor's and Defendant's evidence is unchallenged. Where as before there was a road and vehicular traffic, there is now only pedestrian traffic. The Intervenor's statistics are undisputed on the use of the Church Plaza as an ingress and egress for the buildings on the adjacent, and privately owned, blocks into which the Church Plaza now flows. Persons using the Church Plaza include persons entering the Temple (4,500 a day), persons employed at various LDS Church-owned office buildings on the Church Administration Block (145 a day at Church Administration Building, 100 a day at Relief Society Building, 3,100 a day at Church Office Building; 600 employees at Joseph Smith Building) or visiting various LDS Church-owned buildings in the complex. (600 daily visitors/tourists at Church Office Building; 500 daily diners and 1200 daily film-goers at the Joseph Smith building, 650 daily diners at Lion House and 650 daily visitors at the Beehive House). CPB's Ex. 62 at ¶ 5. The Intervenor's evidence is unchallenged that these uses constitute the "vast majority" of pedestrian use of the Church Plaza. Ex. 20. In addition, as an adjunct to and now major entrance to Utah's most-visited tourist attraction, Temple Square, the Church Plaza provides egress and ingress (but not sole egress and ingress) for tourists who will visit Temple Square but who will not enter the Temple. One of the former entrances to Temple Square was closed, and a new east opening in the 12 foot high wall surrounding Temple Square links the Church Plaza directly to the formerly inaccessible inner courtyard of the Temple. CPB's Ex. 5 ¶¶ 25 and 26. In addition to allowing pedestrian traffic to enter Temple Square, the opening allows the Temple to reflect in the new pool unobstructed by the tall wall that otherwise surrounds Temple

Square. CPB's Ex. 5 ¶¶ 25, 27-28. Further to the north and west of the Property is a block containing the Church Conference Center. This Center seats 21,000 and has over 15,000 weekly visitors. CPB's Ex. 5 ¶ 7 and CPB's Ex. 62 at ¶ 5.

The Church Plaza allows access of pedestrians along many east-west paths enabling free-flow of persons between sites at Temple Square and those at the Church Administration Block. There are no clear boundaries marking the entries of the paths back and forth between the Church Plaza and the Church Administration Block. Ex. 5 ¶¶ 17, 33.

The Intervenor's evidence is also undisputed that the Church Plaza now serves various functions incompatible with its former functions as a city street and city sidewalks. As noted above, the signs and religious statuary and displays signal to the pedestrian that the Church Plaza is a religious enclave. The Property's new functions include spreading the LDS Church's religious message, celebrating religious themes, celebrating the "majesty and beauty" of the Temple, building good will for the LDS Church, enhancing the experience of couples married in the Temple by providing them a "spectacular" setting for wedding pictures, establishing an association between the LDS Church and an atmosphere of beauty and serenity, and preventing urban decay near the LDS Church's sacred sites and its world-wide headquarters. Ex. 4 ¶ 24 and 26.

In response to all the above-discussed undisputed evidence, Plaintiffs offer the conclusory statement that the Property remains a throughway. However, because Plaintiffs provide no information on the relative number of persons so using the Property as a throughway, the evidence is undisputed that the principal uses of the Property have changed.

In *Hawkins*, the area in question no longer formed part of the City's automotive, bicycle or transportation grid and was

not generally, although it was occasionally, used as a throughway. In this case, the Church Plaza is no longer part of Salt Lake City's automotive or other motor vehicle transportation grid and bicycles can traverse the Property only if "walked." Although the Property remains part of the pedestrian transportation grid via the easement, the undisputed facts show the Property's physical character and principal uses have been altered to such an extent that it is clearly a walkway through an enclave area and not part of the City's public sidewalks.

Where the undisputed evidence shows the public forum character of the Property has been closed by selling the Property, changing its physical character, and changing its principal use, under *Hawkins*, it is no longer a public forum.

Plaintiffs contend that under the cases *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F.Supp.2d 1027 (D.Nev.1999) and *Citizens to End Animal Suffering v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D.Mass.1990), the property retains its character as a public forum because the private property owner is performing a public function of maintaining sidewalks. As the parties recognize, there is a narrow exception to the rule announced in *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 521, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), that the First Amendment guarantee of free expression has "no part to play" in a case involving picketing on private property because a privately owned and self-contained shopping mall is not the functional equivalent of municipality within the meaning of *Marsh, supra*. That exception applies where the private party is performing a public function that has been traditionally performed exclusively by the municipality, namely the maintenance of thoroughfare sidewalks. This was the exception relied upon in *Venetian Casino Resort*, 45 F.Supp.2d 1027 and *Faneuil Hall Marketplace*, 745 F.Supp. 65.

Venetian Casino is not applicable because of a dispositive fact in that case; namely, the nature of the sidewalk there as parallel to a public road and to "facilitate pedestrian traffic in daily commercial life *along the Las Vegas Strip*" as well as provide access to the casino. 45 F.Supp.2d at 1034-35 (underlined emphasis added). The sidewalk at issue in *Venetian Casino* paralleled the busy state highway known as the "Las Vegas Strip." The sidewalk was moved sideways from the state-owned property to private property in order to meet twin objectives of building a new casino and widening the highway. The casino agreed to build and keep open a sidewalk on its own property. The temporary sidewalk built on casino property looked somewhat different from the public sidewalks which it adjoined, but was otherwise indistinguishable in form and function. The *Venetian Casino* court held that "[t]horoughfare *sidewalks parallel to the main public street* in a city, that allow citizens to move from one part of the city to the next, have traditionally been exclusively owned and maintained by the government." 45 F.Supp.2d at 1034 (underlined emphasis added). The casino's sidewalk was therefore subject to the "very rare" exception announced in *Marsh, supra*, of imposing constitutional restraints on private property because the property owner is performing a traditional public function. *Id.* at 1035. The *Venetian Casino* court declined to grant a TRO preventing labor union protests on the sidewalk holding that it was a public forum despite being on private land. Further, the *Venetian Casino* court noted that the casino's sidewalk, unlike the Property at issue in this case, was not a specific destination in and of itself.

In this case, there is no longer a main street, or any street, on the Property. The street has been eliminated and a completely different use made of the Property. There is no daily commercial life along a road to facilitate. Instead, there is an ecclesiastic park, a destination in and of itself for picture taking, for viewing statuary and other religious displays, and

similar activities. Because the physical character and principal purpose of the Property have been so altered, the maintenance of a pedestrian easement across the Property is not the maintenance of a public function that subjects the private property owner to constitutional limitations that constrain municipalities.

In *Faneuil Hall*, the area at issue was formerly a historic and important public forum. The City owned the property but leased it under a long term lease with a public easement. *Faneuil Hall* is distinguishable in several respects: the "City continue[d] to own the land in fee simple,"[5] there were no discernable boundaries between the area and the nearby public areas, Faneuil Hall and Square were adjacent to the disputed property and were themselves historically important public forums that at the time of the case remained public areas, and, the lessor had a private security force that arrested the protestors. 745 F.Supp. at 70-71 and n. 10. The *Faneuil Hall* court held that if the City had simply authorized the lessor "to maintain the public walkways, its discharge of that duty might not be state action." 745 F.Supp. at 71-72. However, because the lessor's security force decided who could use the easement and physically prohibited protestors from using the area,[6] its actions were held to be more akin to that of a policeman, a function that has traditionally been the exclusive domain of the state. *Id.*

The Intervenor here is distinguishable from the lessor in *Faneuil Hall* because Intervenor is not exercising police power over who uses the easement. Instead, its security policy clearly shows that the City police need to be called to remove anyone. See CPB's Ex. 4 ¶ 32 and Pl.s' Ex. 20 at

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[5] A fact the *Faneuil Hall* court held of import to the "symbiotic relationship" test but not to the public function test. 745 F.Supp. at 72.

[6] The private security officers arrested, handcuffed and detained the protestors at their security offices. 745 F.Supp. at 67.

§ 2(c) ("West Church Plaza Security Policy") (If a person violating the restrictions refuses a request to discontinue conduct or leave, "the Salt Lake City Police Department will be summoned, unless the nature of the conduct requires immediate lawful intervention by Church representatives, such as when the person presents an imminent danger to himself, others, or property.").

The same reasons that distinguish *Faneuil Hall* and *Venetian Casino* also distinguish other cases cited by Plaintiffs. In *Jackson v. City of Markham, Ill.*, 773 F.Supp. 105 (N.D.Ill.1991), the sidewalk at issue was on state property, maintained by public funds and paralleled the public highway in the traditional manner of public sidewalks, all facts distinguishing it from this case.

In *Thomason v. Jernigan*, 770 F.Supp. 1195, 1200 (E.D.Mich.1991), the public sidewalk easement in question was parallel to a cul-de-sac built on a public street easement over private property. In *Thomason* it was also undisputed that the sidewalks were indistinguishable in form and function from the nearby public sidewalks to which they were attached. Further, in *Thomason*, the court held that the City's action could be invalidated because the vacation of the public easement was for the express purpose of eliminating a public forum on the sidewalk on private property used by a single group of protestors. The facts of this case show the public forum status of the Property was eliminated for all groups of potential public protestors, regardless of the content of their messages. Further, the *Thomason* court's position that a city council's action can be invalidated if it destroys a public forum is incompatible with *Hawkins*. In *Hawkins*, the Tenth Circuit held that a public forum could be cut off by a variety of means, including its sale.

The Court finds by purchasing the Property and creating thereon a religiously oriented pedestrian plaza connecting two privately owned blocks of property, the CPB sufficiently

changed the physical character and principal use or function of the Property so as to terminate its status as a public forum.

Although the Property is not a public forum, Plaintiffs still contend that the easement is a public property right to which constitutional protections apply. *Hawkins* enumerated designated public fora and nonpublic fora as the two other types of government property subject to constitutional protections.

Intent is necessary to establish a designated public forum. *Hawkins*, 170 F.3d at 1286. There is no such intent in this case and in fact there is just the opposite, an express acknowledgment between the private buyer and the governmental seller that the easement is not intended to create a public forum of any kind.

"Nonpublic fora" include any remaining government property that is not by tradition or designation a forum for public use. The undisputed fact is that the only remaining Property interest of the City, and therefore the public use, are extremely limited easements. The pedestrian easement is itself extremely limited even without the §§ 2.2 and 2.3 restrictions and conditions because it authorizes "pedestrian access and passage only."

Intervenor CPB contends that a limited pedestrian easement is not a sufficient property right belonging to the government to constitute a nonpublic forum within the meaning of *Hawkins*.

Plaintiffs contend that it is and move for partial summary judgment. They contend that even if the property is no longer a public forum, they seek declaration that the easement is a public property right and that the easement's restrictions are not reasonable and violate the First Amendment and the Due Process Clause because they restrict speech according to viewpoint. Plaintiffs note the easement expressly recognizes the property owner's right to distribute literature, erect signs

and displays and project messages and music, all activities banned for users of the pedestrian easement. Easement Section 2.2. Plaintiffs rely on *ACLU of Nevada v. City of Las Vegas*, 13 F.Supp.2d 1064 (D.Nev.1998), a preliminary injunction case where the court found the ACLU was not likely to prevail on its claim that an enclosed downtown mall that covered part of Las Vegas' downtown was still a public forum; yet the court held that the ACLU was likely to prevail on its claim that the mall was a non-public forum and restrictions placed on all picketing except labor disputes were not rationally related to the government interest. As evidence the restrictions are not rationally related, Plaintiffs point to the fact that the landowner is allowed to pass out literature, erect signs, have a kiosk, etc., while pedestrians are not.

The cases cited for restrictions on use of non-public fora involve property owned and/or controlled by the government or a governmental agency and include a broad range of property types. *See Cornelius v. NAACP*, 473 U.S. at 806, 105 S.Ct. 3439 (the CFC, the federal employees charitable fund-raising program administered by the federal government is nonpublic forum); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (airport terminal owned by port authority is non public forum); *United States v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (sidewalk used for access to post office is nonpublic forum).

Having considered the undisputed evidence, the court finds that the limited pedestrian easement is a governmentally owned property right that could be considered a nonpublic forum. As such the court must find that the restrictions are rationally related to a legitimate governmental purpose. The following rules apply to nonpublic fora:

> In a nonpublic forum, the government has much greater latitude to restrict protected speech. The law draws no distinction between content-neutral and content-based

> restrictions in a nonpublic forum. Provided the restriction is reasonable in light of the purpose served by the forum and is "not an effort to suppress expression merely because public officials oppose the speaker's view," it does not violate the First Amendment. *[Arkansas Educ. Television Commission v.] Forbes*, [523 U.S. 666], 118 S.Ct. at 1641 [, 140 L.Ed.2d 875 (1998)]; *see also, e.g., Lee*, 505 U.S. at 679, 112 S.Ct. 2701; *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439. For a court to uphold a speech restriction as reasonable, "it need not be the most reasonable or the only reasonable limitation." *Lee*, 505 U.S. at 683, 112 S.Ct. 2701 (quoting *United States v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion)). Furthermore, "[i]n contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439.

Hawkins, 170 F.3d at 1287.

In this case the types of activities that Plaintiffs wish to engage are absolutely prohibited on the easement. No one entering the property pursuant to the pedestrian easement may engage in protest, pickets, distribution of materials, or like actions. Thus, the restrictions are content-neutral. The restrictions are rationally related to the legitimate governmental interest because such activities are incompatible with the property right held by the City, which is merely for "pedestrian access and passage only."

Plaintiffs complain that the CPB may conduct activities prohibited under the easement. However, any conduct of such activities by the CPB is in its capacity as the property owner and is unrelated to use of the easement.

In making its determination that the easement's restrictions on the use of the easement as a nonpublic forum are reasonable in relation to the purpose served by the forum, the

court places major reliance on balancing the rights of the private property owner in controlling the usage of its property against the claimed residual First Amendment rights the Plaintiffs wish to exercise on the City's pedestrian easement over the Property. That property owner, the CPB, paid what is undisputedly full market value for the property—a price that was not diminished for the value of the pedestrian and other easements. The CPB has expended considerable monies to alter the property for a specific purpose, the same purpose for which it was sold by the City and acquired by the CPB. The court cannot find that the pedestrian easement, any more than the view corridor or the utility easements, is the kind and quality of a governmentally-owned property right that would allow members of the public to interfere with or harm the purpose for which the private property owner acquired the Property, built the Church Plaza and maintains the Church Plaza. Although strict incompatibility between the nature of the speech and the functioning of the nonpublic forum (the pedestrian easement) is not mandated to uphold restrictions,[7] such incompatibility is present in this case. The City's interest in the easement is for the limited purpose of allowing pedestrians access to and passage over the Property. Prohibitions that prevent uses of the easement other than pedestrian passage are rationally related to maintaining the purpose of a pedestrian easement—passage over property. Prohibiting any protests, picketing, leafleting, erecting displays, using loud speakers to project music and the like on the limited easement is reasonable in light of the purpose of the nonpublic forum as a pedestrian easement.

This is especially true on the facts of this case where it is undisputed that the public still has unrestricted access to the extensive public sidewalks that border the Church Plaza on two sides as well as bordering the adjacent Temple Square

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[7] *Hawkins*, 170 F.3d at 1287 (quoting *Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439).

and Church Administration Block.[8] In *Hawkins*, the Tenth Circuit held that its conclusions on the reasonableness of the restrictions at issue were "bolstered by the fact that ample alternative channels for communications remain available to" the plaintiffs therein because they could have, by the alternative means reached a large portion of the persons using the nonpublic forum. 170 F.3d at 1291 at n. 7. The nearby Conference Center is also entirely surrounded by public sidewalks which remain open to the exercise of traditional free speech activities. *See* CPB Exs. 4 at ¶ 31 and 20 ¶ 4 (In year 2000, protests shifted from the south gate of Temple Square to North Temple street near the Conference Center because protestors locate themselves in the vicinity of the largest audience).

In addition, there is a rational government interest in the City's being able to obtain pedestrian easements in the future. For example, the City has a pedestrian easement over private property for the Bonneville Shoreline Trail in the City's foothills. CPB's Ex. 14. If pedestrian easements granted to the City burdened the property owners with the requirement of allowing pedestrians the right to congregate on the burdened property to protest, picket, leaflet, broadcast messages/music over loud speakers and other activities incompatible with access and passage, it would seriously impair the City's ability to obtain such easements for the benefit of the public.

Moreover, under the circumstances of this case as established by the undisputed record before the Court, there exists no First Amendment right to associate on private property belonging to another.

Lastly, to the extent that Plaintiffs' claims are based upon actions arguably prohibited by the easement's restrictions against "offensive, indecent, obscene, vulgar, lewd or

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[8] *Compare* Ex. 5 ¶ 36 and Cordova Aff. ¶ 26.

disorderly speech, dress or conduct" and the right under the easement to exclude habitual violators, Plaintiffs have not claimed they want to engage in such conduct and have not shown that these provisions are likely to be enforced against them. Accordingly, there is no "direct and immediate dilemma" for Plaintiffs that could place an "inhibiting chill" on their First Amendment rights. Without the threat of enforcement of these provisions against Plaintiffs, a decision at this time regarding those provisions would entangle this court in an "abstract disagreement" about the provisions and their applicability. Thus, any such claims based on those provisions must await the time they are presented in "clean-cut and concrete form." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d at 1499-1500.

Under the undisputed facts, the Property is not a First Amendment forum of any type and thus is not subject to the constitutional constraints claimed by Plaintiffs. Accordingly, Plaintiffs' Motion for Summary Judgment on their First Claim for Relief under the First Amendment will be denied and Defendant City's and Intervenor CPB's Motions for Summary Judgment on these claims will be granted.

VIII Summary Judgment on Establishment Clause Claims

Plaintiffs move for summary judgment on their claim that the function of interpreting and enforcing the easement is a "traditional government function" and that by delegating that function to the landowner, "the LDS Church," the City violates the Establishment Clause. Plaintiffs rely on *Faneuil Hall* dicta to the effect that the power to decide who can use a public easement is an exclusive state function and therefore subject to constitutional scrutiny whether or not delegated to a private party, 745 F.Supp. at 72, and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) (Boston's statute giving churches, in effect, veto power over issuance of liquor licenses, a traditional state function violated Establishment Clause).

The City and Intervenor move for summary judgment on the Establishment Claim on the basis that there is no evidence of collusion in favor of, or favoritism for, the LDS Church, the sale of the property meets the *Lemon* test for determining that it did not violate the Establishment Clause and there is no unconstitutional delegation of a traditional government function to a church.

Establishment Clause case law is notoriously confused and difficult. A recent case from the Tenth Circuit, *Bauchman v. West High School*, 132 F.3d 542 (10th Cir.1997), acknowledges this difficulty and sets forth the applicable law:

> The First Amendment states the government "shall make no law respecting an establishment of religion." This prohibition extends to state government, including the Utah public schools, by operation of the Fourteenth Amendment.
>
> Determining whether Ms. Bauchman has alleged facts sufficient to support her claim that defendants have violated this prohibition is not an easy task, as there is no bright line standard we can apply. The United States Supreme Court repeatedly has recognized *there can be no precise Establishment Clause test capable of ready application*, and therefore has resisted confining such sensitive analyses to "any single test or criterion." *Lynch v. Donnelly*, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). . . . . To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective. Indeed, many believe the Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger v. University of Virginia*, 515 U.S. 819, 861, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (Thomas, J. concurring), and in need of "[s]ubstantial revision." *County of Allegheny v. American Civil Liberties Union*,

492 U.S. 573, 656, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Kennedy, J. concurring in part and dissenting in part).

Our attempt to glean an appropriate standard for this case from existing, muddled Establishment Clause precedent begins with *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which is recognized as the benchmark case for Establishment Clause analysis. Applying *Lemon*, government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement. 403 U.S. at 612-13, 91 S.Ct. 2105.

Beginning in the 1980s, however, the *Lemon* analysis came under vigorous attack by Justices and commentators alike.

* * * * * *

Acknowledging *Lemon's* weaknesses, Justice O'Connor seized the opportunity in *Lynch v. Donnelly* to draft a concurring opinion encouraging the Court to refine the *Lemon* analysis to focus more on whether the government is "endorsing" religion. 465 U.S. at 687-94, 104 S.Ct. 1355. Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that "religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 592-93, 109 S.Ct. 3086; *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality); *Lynch*, 465 U.S. at 687-94, 104 S.Ct. 1355 (O'Connor, J., concurring). Recent cases suggest the purpose component of the endorsement test

should evaluate whether the government's "actual" purpose is to endorse or disapprove of religion (*i.e.*, did the government intend to endorse or disapprove of religion); *Edwards*, 482 U.S. at 585, 107 S.Ct. 2573; *Jaffree*, 472 U.S. at 56, 105 S.Ct. 2479 (adopting Justice O'Connor's revision of the purpose component from *Lynch v. Donnelly*). The effect component, on the other hand, should evaluate whether a "reasonable observer," aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval. *Capitol Square*, 515 U.S. at 779-81, 115 S.Ct. 2440 (O'Connor, J., concurring). Justice O'Connor's "endorsement test" is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims. *See* James M. Lewis & Michael L. Vild, A Controversial Twist of Lemon: The Endorsement Test as the Establishment Clause Standard, 65 Notre Dame L.Rev. 671 (1990). It would be wrong, however, to suggest the Court is unanimous in its adoption of the endorsement test. Moreover, even the Justices who have adopted the endorsement test do not agree on how it should be applied. *Id.* at 687-88. For example, although the Court has indicated a failure to satisfy the purpose component of the endorsement test alone is sufficient to invalidate government action, *Edwards*, 482 U.S. at 585, 107 S.Ct. 2573; *cf.*, *id.* at 610, 107 S.Ct. 2573 (Scalia, J., dissenting) (questioning the premise that government action can be invalidated on the basis of motivation alone, without regard to the effect), the Court rarely has decided cases based solely on the purpose component. *See Jaffree*, 472 U.S. at 75, 105 S.Ct. 2479 (O'Connor, J. concurring). When it has, the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry. *See*

Edwards, 482 U.S. at 613, 107 S.Ct. 2573 (Scalia, J., dissenting) (citations omitted); *Lynch*, 465 U.S. at 680, 104 S.Ct. 1355 (citations omitted). To the extent the Court has delved into the government's subjective intent in its evaluation of the actual purpose, such approach has been openly condemned by two members of the present Court—Chief Justice Rehnquist and Justice Scalia. *Edwards*, 482 U.S. at 610, 107 S.Ct. 2573 (Rehnquist, C.J, and Scalia, J., dissenting). According to Justice Scalia, who has proposed eliminating the purpose component altogether, discerning the government's subjective intent is "almost always an impossible task . . . [t]o look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Id.* at 636-37, 107 S.Ct. 2573. *Consequently, despite Sisyphean efforts, application of this component yields unprincipled results. Id.* at 636, 107 S.Ct. 2573; *Jaffree*, 472 U.S. at 112, 105 S.Ct. 2479, (Rehnquist, J., dissenting).

Having struggled to meaningfully apply the purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree *it is an unworkable standard* that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect. Nevertheless, the uncertainty surrounding the present Court's position regarding the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon*, when evaluating Ms. Bauchman's Establishment Clause claim.

Bauchman v. West High School, 132 F.3d at 550-52 (underlined emphasis added and citations partially omitted).

Plaintiffs appear to argue that *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), trumps the *Lemon* test. In *Larkin*, the Supreme Court held that independent of the first of the *Lemon* criteria (secular purpose), "by delegating a governmental power to religious institutions," the statute at issue "inescapably implicates the Establishment Clause" and therefore was declared void. The statute at issue in *Larkin* gave what amounts to veto power to churches over the issuance of liquor licenses. The Supreme Court found by giving churches a standardless veto power it was giving important discretionary power to be delegated to or shared with churches in violation of the Establishment Clause. 459 U.S. at 122-23, 103 S.Ct. 505.

Plaintiffs couple the *Larkin* ruling with the following language from *Faneuil Hall* for the proposition that deciding who may use an easement is a governmental function and under *Larkin*, it is a violation of the Establishment Clause for the City to have delegated the function to a church.

> Indeed, the power to decide who can use a public easement goes beyond even that of a policeman. Unlike the policeman who merely executes decisions of policy, defendant here is actually making those policy decisions. Defendant's role is thus more like that of a legislature, which is even more clearly an exclusive state function. *The essential purpose of the easement here is to ensure public access to the Marketplace. The exercise of control over the public's right to use the easement is subject to constitutional scrutiny, whether employed directly by the State or through delegation to a private party.*

Faneuil Hall, 745 F.Supp. at 72 (underlined emphasis added).

The Plaintiffs contend that the Warranty Deed gives the power to decide who uses the public to the CPB in several respects: by being able to decide who is offensive, lewd, etc.,

and therefore may be excluded under § 2.2 and by giving the power to "lawfully" exclude habitual violators of this standardless criteria under § 2.3

Intervenor CPB distinguishes *Faneuil Hall* because, as noted above, it is not exercising police power over who uses the easement. Instead, its security policy clearly shows that the City police need to be called to have anyone removed and if the police decline to move the person the CPB has its ordinary remedies available under state law. Pl.s' Ex. 20 at § 2(c) ("West Church Plaza Security Policy") and CPB's Ex. 5 ¶ 33. Defendant City concurs in this position.

The CPB submits cases in support of its position that the enforcement of easements is not a traditional governmental function but rather is a matter left to private enforcement in state court. *E.g. State ex rel. Branton Family, L.P. v. Jackson County*, 880 S.W.2d 571 (Mo.App.1994) (dispute over proposed use of easement).

The Court rejects Plaintiffs' argument that under *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), the City violated the Establishment Clause by delegating to the LDS Church an exclusive governmental function. The alleged function at issue here is the right of the CPB under the Deed to exclude persons who exceed the scope of the pedestrian access easement. Section 3 of the Warranty Deed, providing that Grantee may use all lawful means available to owners of private property to prevent any uses of the easements which are contrary to the provisions of the easement, is an acknowledgment that the landowner CPB is not granted any special status in the enforcement of the restrictions of the easements. Further, it is undisputed that the landowner's policy is to call the City police if the landowner finds it necessary to exclude persons.

As noted above, *Faneuil Hall* is distinguishable on its facts. In that case, private security police arrested demonstrators and physically excluded them from the property.

Here there exists no genuine issue of material fact that except in cases where the nature of the conduct requires immediate lawful intervention "such as when the person presents an imminent danger to himself, others, or property"—the Property owner's policy is that it will call City police when an issue of enforcement or exclusion arises. See CPB's Ex. 60 (West Church Plaza Security Policy). Section 3 of the Deed provides the CPB may use all lawful means available to the owners of private property to prevent uses of the easement that are contrary to the rights granted in the Deed. Thus, it has not been delegated any exclusive state function or any special status or rights. In enforcing the limits of the easement over its property or in protecting any other of its property rights, the CPB has only those rights and powers which other private property owners enjoy. Having rejected Plaintiff's theory under their reading of *Larkin* and *Faneuil Hall*, the court turns to the traditional *Lemon* test.

Under the *Lemon* test, a government act does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement of church and state. *Lemon* 403 U.S. at 612-13, 91 S.Ct. 2105. The Court finds that, on the undisputed facts before it, each prong of the *Lemon* test is met.

The secular purposes of the City's sale of the property to the CPB are numerous and undisputed. They are set forth in the Planning Commission's Report, CPB's Ex. 12, at 4-8 and 12. (Setting forth 17 broad secular purposes).

Among the secular purposes is the enhancement of the City's, and the State's, major tourist draw. The figures produced by the CPB are undisputed. Those figures show that literally millions of persons visit Temple Square each year, so many that it was nearly physically impossible to fit the crowds on the Temple Square grounds during the Christmas season when lights on Temple Square are a very popular

attraction. CPB Ex. 26 ¶ 26. In the past, 3.5 to 9 million persons visited Temple Square and nearby LDS Church sites each year and in the near future those numbers are expected to increase dramatically. CPB Exs. 4 at ¶ 8 and Ex. 18 Kemp Aff. ¶ 4.

To state a claim under the effects component of the endorsement test, a plaintiff must allege facts indicating the sale has a principle or primary effect of advancing or endorsing religion.

> United States Supreme Court precedent "plainly contemplate[s] that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683, 104 S.Ct. 1355. However, not every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid. *Id.* Thus, as noted above, the Constitution does not forbid all mention of religion in public schools. The Establishment Clause prohibits only those school activities which, in the eyes of a reasonable observer, advance or promote religion or a particular religious belief. This is an objective inquiry, not an inquiry into whether particular individuals might be offended by the content or location of the Choir's performance, or consider such performances to endorse religion. *Gaylor*, 74 F.3d at 217.

Bauchman, 132 F.3d at 555.

In this case, because the purchaser was the temporal arm of a church, there would naturally be a benefit to that church. However, incidental benefits to a religion from governmental action do not invalidate that action. *Bauchman*, 132 F.3d at 555. The CPB was the adjacent landowner and the owner of the subsurface rights. As such, under City policy it is the only party to whom the City would have sold the surface rights. Cordova Aff. ¶ 23. The closure and sale of streets and

alleys is common in the City, including for purposes such as the promotion of tourism, and such sales have been made to other churches. *Id.* at ¶ 24 and Ex. C; Meeker Aff. Ex. B (City Council's street closure policy); Patterson Aff. ¶¶ 15 and 16 and Ex. E (list of City's street closures 1970 through 1999).

A reasonable observer aware of the context, purpose and history of city planning in Salt Lake City, "including the historical tension between the government and the Mormon Church," 132 F.3d at 555, the historic presence of LDS Church property in the center of the City, and the millions of annual visitors to such LDS Church property, would not find that the result of the City's acceptance of a full market value price for the surface rights to the Property had the principal or primary effect of advancing religion. Rather, a reasonable observer would find the principal or primary effects of the sale are those stated secular purposes the City expressed when it made the sale, including the enhancement of its major tourist attraction.

The entanglement analysis typically is applied to circumstances in which the state is involving itself with religious activity or religious institutions. *See Florey v. Sioux Falls School Dist., No. 49-5,* 619 F.2d 1311, 1318 (8th Cir.1980) (school board's policy on Christmas program). In this case the City has not entangled itself in the recognized religious activities of the CPB or the LDS Church by selling the CPB real property for full market value. To have refused to make an otherwise justified sale solely because the purchaser was the temporal arm of a religious organization or because the Property would be used by its new owner for religious purposes would have shown perhaps unconstitutional hostility to religion. This is especially true as other City streets or alleys have been closed and sold to other organizations, including other churches.

Further, the court agrees with the CPB's contention that to try to promulgate and enforce speech restrictions against the property owner's use of its own property to communicate its religious message would excessively entangle the City in the property owner's exercise of its freedom of religion. Consequently, the court perceives no state involvement with religious activity or excessive entanglement of church and state under the undisputed facts of this case.

Thus, under the *Lemon* test, there is no Establishment Clause violation. The Utah Constitution's establishment clause is also not violated on the undisputed facts.

Finally, the court finds no evidence in the record to support Plaintiffs' position that the events leading up to the sale somehow violated the Establishment Clause.

Accordingly, Plaintiffs' Motion for Summary Judgment on this claim should be denied and Defendant City's and Intervenor's Motions for Summary Judgment on the Establishment Clauses of the U.S. Constitution and the Utah Constitution will be granted.

IX Summary Judgment on Equal Protection Claims

The City and the Intervenor move for Summary Judgment on this claim claiming that Plaintiffs have failed to show that the sale denied the equal protection of the law.

The Equal Protection Clauses of the U.S. Constitution and the Utah Constitution protect against discrimination amongst similarly-situated individuals. *Malan v. Lewis*, 693 P.2d 661 (Utah 1984) and *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

Because the court has determined that the property is not a public forum, the classifications need only be rationally related to a legitimate government interest. *ACLU v. City of Las Vegas*, 13 F.Supp.2d 1064, (D.Nev.1998).

In this case, there is no denial of Equal Protection because in a nonpublic forum, the property owner's use of its property for speech purposes is not similarly situated to the use of pedestrians under an easement limited to "pedestrian access and passage only."

No other persons are allowed to use the easement for the prohibited activities in which Plaintiffs wish to engage. The fact that the property owner can engage in activities on its own property, and that the easement acknowledges that right, does not mean that the property owner is treated differently under the easement—its right to use the property flows from ownership, rather than from use under the easement and, therefore, the different treatment does not cover similarly-situated individuals.

Further, the court has already found, *supra*, that the restrictions in the easement are rationally related to the legitimate governmental interests in the easement.

The Intervenor is correct that the Plaintiffs admit they have no direct evidence of intentional discrimination in connection with their equal protection claims. Where there is no evidence of intentional discrimination and no similarly-situated class being treated differently, the court need not examine the history of the sale under the test for determining whether invidious discriminatory purpose was a motivating factor in the governmental action set forth in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

Further, to the extent that the Equal Protection claim seeks to review the disputed "offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct" provision of § 2.2 or the "Exclude Habitual Violators" provision of § 3, Plaintiffs' challenge is not ripe for the reasons stated above in connection with the Free Speech challenge to such a claim.

There are no material issues of fact on the Equal Protection Claims under the federal or Utah Constitutions. Based upon the foregoing, the Court finds that Plaintiffs have failed to come forward with issues of facts upon which a reasonable finder of fact could find in their favor on their equal protection claim. Accordingly, Plaintiffs' Motion for Summary Judgment on this claim will be denied and Defendant City's and Defendant Intervenor's Motion for Summary Judgment on the Equal Protection claim under the U.S. Constitution and the Utah Constitution will be granted.

X Conclusion and Order

Based upon the foregoing, it is therefore

ORDERED that Defendant Salt Lake City Corporation's and Intervenor CPB's Motions for Summary Judgment on Plaintiffs' First, Second and Third Claims for Relief, including Plaintiffs' supplemental State constitutional claims, are GRANTED. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4111

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, *et al.*,
Plaintiffs-Appellants,

v.

SALT LAKE CITY CORPORATION,
a municipal corporation,
Defendant-Appellee,

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
Defendant-Intervenor-Appellee,

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,
Amici Curiae.

ORDER
Filed November 14, 2002

Before SEYMOUR, McWILLLIAMS and HENRY, Circuit Judges.

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

Affects Sidwell Nos.
08-36-479-001
09-31-352-001
09-31-352-003
09-31-352-008
09-31-352-009

SALT LAKE CITY ORDINANCE
No. 28 of 1999

(Closing a portion of Main Street between
North Temple and South Temple Streets)

AN ORDINANCE CLOSING A PORTION OF MAIN STREET LOCATED BETWEEN NORTH TEMPLE AND SOUTH TEMPLE STREETS, PURSUANT TO PETITION NO. 400-98-79.

WHEREAS, the City Council of Salt Lake City, Utah, finds after public hearings that the City's interest in the portion of the street described below, is not necessary for use by the public as a street and that closure of this portion of the street will not be adverse to the general public's interest; and

WHEREAS, the title to the closed portion of the street shall remain with the City until sale for fair market value or the receipt of equivalent value in accordance with Salt Lake City Code Chapter 2.58;

NOW, THEREFORE, *be it ordained by the City Council of Salt Lake City Utah*:

SECTION 1. That a portion of Main Street located between North Temple and South Temple Streets, which is the subject of Petition No. 400-98-79, and which is more particularly described on Exhibit "A" attached hereto, b., and the same hereby is, closed and declared no longer needed or available for use as a street.

SECTION 2. *Reservations and Disclaimers.* The above closure is expressly made subject to all existing rights-of-way and easements of all public utilities of any and every description now located on and under or over the confines of this property and also subject to the rights of entry thereon for the purposes of maintaining, altering, repairing, removing or rerouting said utilities, including the City's water and sewer facilities. Said closure is also subject to any existing rights-of-way or easements of private third parties.

SECTION 3. *Conditions.* This partial street closure is conditioned upon payment to the City of the fair market value of the closed portion of the street, or its equivalent, and title to this closed portion of the street shall remain with the City until sale for fair market value, or the receipt of equivalent value, in accordance with Salt Lake City Code Chapter 2.58.

This partial street closure is also conditioned upon compliance with all of the conditions identified by the Salt Lake City Planning Commission, a modified summary of which is attached hereto as Exhibit "B".

SECTION 4. *Effective Date.* This ordinance shall become effective on the date of its first publication and shall be recorded with the Salt Lake County Recorder. The City Recorder is instructed not to publish or record this ordinance until the conditions identified above have been met, as certified by the Salt Lake City Property Manager and the Salt Lake City Planning Director. If the conditions identified above have not been met within one year from the date of this ordinance, the City Recorder is instructed not to publish or

record this ordinance, which shall become null, void and have no effect.

Passed by the City Council of Salt Lake City, Utah, this 13 day of April, 1999.

/s/ [Illegible]
CHAIRPERSON

ATTEST AND COUNTERSIGN:
/s/ Christine Meeker
CHIEF DEPUTY CITY RECORDER

Transmitted to Mayor on 4-14-99.

Mayor's Action: XXX Approved ____ Vetoed.

/s/ [Illegible]
MAYOR

ATTEST AND COUNTERSIGN:
/s/ Christine Meeker
CHIEF DEPUTY CITY RECORDER

(SEAL)

Bill No. 28 of 1999.
Published: May 3, 1999.

EXHIBIT "A"

MAIN STREET PROPERTY DESCRIPTION

Beginning at the Southeast corner of Block 87, Plat A, Salt Lake City Survey, located in the Southwest quarter of section 31, Township 1 North, Range 1 East, Salt Lake Base Meridian, and running thence North 00°01'42" west 660 feet along the east line of said block 87 to the Northeast corner of said block 87. Thence North 81°22'22" East 134.07 feet to the South right of way line of North Temple Street, a point that is North 00°02'13" West 18 feet from the Northwest Corner of Block 88, Plat A, thence South 00°02'13" East 678 feet along the west line of block 88 to the Southwest corner of block 88: thence South 89°05'14" West 132.68 feet to the point of beginning.

EXHIBIT B

Modified summary of conditions imposed by the Salt Lake City Planning Commission:

1. The City shall retain a perpetual easement for a 24-hour public pedestrian and bicycle access from North Temple to South Temple within the existing street right-of-way. The easement shall have no perimeter gates or fences along the North Temple or South Temple rights of way, but Petitioner may erect decorative fencing and similar structures which are commonly used in similar plazas, with written approval of the Planning Director. The plaza shall be planned and improved so as to maintain, encourage, and invite public use.

2. The Petitioner shall submit a construction schedule showing the traffic impacts of its construction work related to other construction projects in the area which are already underway or planned, and what mitigation measures are planned.

3. Construction work on the underground parking structure and plaza shall be performed in such a way that it does not interfere with the travel lanes on North Temple and South Temple streets during the reconstruction of South Temple Street.

4. A utility easement shall be retained by Salt Lake City through the former Main Street right-of-way for all existing public and private utilities.

5. To protect the view corridor to the Pioneer Museum and through to Ensign Peak no occupied buildings shall be constructed on the former Main Street right-of-way, except that Petitioner may erect and maintain one or more kiosks or information booths which may be occupied by attendants.

6. In the former Main Street right-of-way, all structures and buildings/uses (i.e. fountains, kiosks, trellises) ancillary to a pedestrian plaza that require a building permit shall be subject to approval by the Salt Lake City Planning Director.

7. The Planning Director shall have final approval of the landscaping plan and pedestrian plaza.

8. The zoning for the plaza shall be determined according to Section 21A.22.030 A of the Salt Lake City Code. Therefore the zoning will be UI and D-1 and the centerline of the former Main Street right-of-way shall be the boundary of the two districts.

9. An emergency vehicle access easement shall be established and constructed on the west side of the plaza through the former Main Street right-of-way.

10. Petitioner shall use its best efforts to discourage any through access from the parking garage onto Main Street northbound through the Capitol Hill neighborhood.

11. The pedestrian plaza and parking garage shall meet all applicable City Codes and requirements from all City Divisions and Departments.

12. Any construction activity associated with the new parking structure and/or plaza that will impact travel lanes on either North Temple or South Temple shall be completed before construction work is started on the South Temple reconstruction project between Main Street and 700 East.

13. The Petitioner shall participate on a special task force comprised of the City, the Utah Department of Transportation, and neighborhood representatives to

identify and recommend solutions to the longstanding traffic issues in these neighborhoods, including, but not limited to:

A. Excessive traffic volumes entering the Avenues neighborhood on Second Avenue;

B. Excessive commuter traffic using Victory Road, 600 North, Columbus Street, Main Street, and other Capitol Hill neighborhood streets; and

C. Jurisdictional roadway and/or operational transfer agreements between the City and UDOT affecting traffic control and operational issues such as traffic signal placement and timing, route signing, employment of traffic calming techniques, etc.

14. The Petitioner shall hold an open house to gain public input for the design of the pedestrian plaza before final approval.

STATE OF UTAH,)
) ss.
City and County of Salt Lake City,)

I, Beverly Jones Deputy, City Recorder of Salt Lake City, Utah, do hereby certify that the attached document is a full, true and correct copy of Ordinance 28 of 1999 closing a portion of Main Street between North Temple and South Temple pursuant to Petition No. 400-98-79 passed by City Council/Executive Action of Salt Lake City, Utah, April 13, 1999 as appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said City, this 27th day of April 1999.

/s/ Beverly Jones
Deputy City Recorder

Published May 3, 1999

[SEAL]

APPENDIX E

AFTER RECORDATION RETURN TO:
Kirton & McConkie
c/o Marc N. Mascaro
60 East South Temple, #1800
Salt Lake City, Utah 84111 [Recorded APR 27, 1999]

SPECIAL WARRANTY DEED

SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah ("GRANTOR"), hereby specially conveys and warrants against all acts of Grantor, including without limitation any conveyance, alienation, mortgage or other transfer or encumbrance, and not otherwise, pursuant to Petition No. 400-98-79 and Salt Lake City Ordinance No. 28 of 1999, to the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation, whose mailing address is 50 East North Temple, Suite 1800, Salt Lake City, Utah 84111, ("GRANTEE") for the sum of TEN DOLLARS ($10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, all of Grantor's interest in the following described real property located in Salt Lake County, State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO.

Said conveyance is subject to the following reservation of easements:

1. *Purpose of Easements.* The easements reserved herein are intended and shall be used for the following purposes only:

1.1. *Emergency and Public Safety.* Grantor hereby reserves an easement over and across the surface of the Property for access and passage by emergency and public

safety personnel and vehicles, including, without limitation, police, ambulance, paramedic and firefighting personnel and vehicles.

1.2. *Public and Private Utilities Easement.* Grantor hereby reserves an easement over, across and through the Property for operation, maintenance, repair, alteration, replacement, enlargement and emergency access, of all existing public and private underground utility lines, including, without limitation, water, sewer, storm drain, telecommunications, electrical, gas, fiber optic and cable lines. Grantor's utility lines may be relocated upon the mutual prior consent of both Grantor and Grantee (which consent shall not be unreasonably withheld), at the expense of the party requesting relocation. Other utility lines may be relocated upon the mutual prior consent of both Grantee and the owner of the utility line (which consent shall not be unreasonably withheld), at the expense of the party requesting relocation. Grantee shall not erect any buildings or other permanent structures, including other utility lines, over Grantor's utility lines which would impede Grantor's access to existing utility lines. Grantor shall not be responsible for the cost of restoring any surface improvements on the Property.

1.3. *Pedestrian Access and Passage.* Subject to the conditions, limitations, and restrictions set forth in section 2 hereinbelow, Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage only, including bicycles, provided that they are walked across the Property, and including dogs on leash. Skate boards, roller blades and roller skates shall not be allowed. The Property shall be available for such pedestrian access and passage at all times, both day and night. Grantee shall not erect any perimeter fences or gates on the Property along the North Temple or South Temple rights of way, but Grantee may erect decorative fencing and similar structures which are commonly used in plazas similar to

the Property, with the written approval of Grantor. Grantor may allow the general public to use this easement for pedestrian access and passage only, but all use of this easement shall be subject to the conditions, limitations and restrictions described hereinbelow.

1.4. *Preservation of View Corridor.* In order to preserve the view corridor to the Daughters of the Utah Pioneers Museum and to Ensign Peak, Grantee shall not erect any occupied buildings on the Property; provided, however, that Grantee may erect and maintain one or more kiosks or information booths which may be occupied by attendants.

2. *Conditions Limitations and Restrictions.* Notwithstanding anything to the contrary in this instrument, the easements reserved herein are subject to the following conditions, limitations and restrictions:

2.1. *Private Property.* The Property is and shall at all times remain the private property of Grantee. Nothing herein shall be deemed to dedicate the Property to public ownership or use beyond the scope of the reserved easement. The use of the Property by the Public is and shall remain permissive, and neither Grantor nor the public shall acquire any rights to the Property by such use beyond the scope of the easement reserved herein. Neither Grantor nor the public shall be entitled to claim or assert any prescriptive use rights or any right of adverse possession against Grantee. No third party shall be entitled to claim or assert any rights against Grantee or against the Property beyond the use of the easement described herein. Grantee shall have the right to landscape the Property, to improve the Property with gardens and/or other improvements, and to restrict the pedestrian access and passage to sidewalks or walkways intended for that purpose, provided that the pedestrian flow across the Property shall not be unreasonably obstructed or limited.

2.2. *Right to Prevent Uses Other Than Pedestrian Passage.* Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other users of the easement and are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

2.3. *Right to Exclude Habitual Violators.* Grantee may prohibit and lawfully prevent access to the Property by individuals who: (a) have threatened or intentionally caused harm to leaders or members of The Church of Jesus Christ of Latter-day Saints; or (b) have threatened or intentionally caused damage to buildings or property owned or used by Grantee or by The Church of Jesus Christ of Latter-day Saints; or (c) have on more than one previous occasion entered on the Property and engaged in activities identified in section 2.2 above.

3. *Enforcement.* Grantee may use all lawful means available to owners of private property to prevent any uses of

the easements which are contrary to the provisions of this instrument. Without limiting the generality of the foregoing, Grantee shall have the right to obtain injunctive relief enforcing the provisions of this instrument.

4. *Right of Reverter.* In the event that Grantee fails to use the Property for the purposes set forth herein, or fails to maintain the Property thereafter, the ownership of the Property shall, at Grantor's option, revert to Grantor.

5. *Notice and Opportunity to Remedy Deficiencies.* Prior to exercising the right of reverter, Grantor shall give written notice to Grantee of the deficiencies in Grantee's use or maintenance of the Property. Grantee shall thereafter have a period of no less than six months to remedy such deficiencies. If such deficiencies are remedied within that six month time period, title to the Property shall remain with Grantee. If such deficiencies are not remedied within that six month time period, Grantor shall give written notice to Grantee of such failure and title to the Property shall immediately revert to Grantor.

6. *Miscellaneous Provisions.*

6.1 *Integrated Agreement.* This instrument contains all of the terms, covenants, conditions and agreement between the parties hereto with respect to the subject matters treated herein.

6.2. *Severability.* In the event that it is finally determined by a court having jurisdiction over Grantee or the Property that any of the terms, conditions, limitations or restrictions set forth in this instrument are unconstitutional or otherwise unenforceable, the remaining terms, conditions, limitations and restrictions set forth herein shall remain binding and enforceable.

6.3. *Amendments.* Although Grantor may allow use of the pedestrian access easement reserved in section 1.2 by the general public, it is understood and agreed that this instrument and the easement reserved herein can be

amended, modified or terminated by written agreement between Grantee and Salt Lake City Corporation alone without the joinder or consent of any other person or entity. Any written amendment or modification of this instrument executed by Grantee and by Salt Lake City Corporation shall become binding immediately on all users of the easements reserved herein.

6.4. *No Agency Relationship.* Nothing in this instrument shall create or be construed as creating an agency relationship between Grantor and Grantee.

6.5. *Governing Law.* This instrument concerns real property located in the State of Utah and shall be governed by and construed in accordance with the laws of the State of Utah.

6.6 *Interpretation.* This instrument shall be interpreted and construed only by the contents hereof, and there shall be no presumption or standard of construction in favor of or against either Grantor or Grantee.

IN WITNESS WHEREOF, Grantor and Grantee have executed this instrument this ____ day of _____, 1999.

[RECORDED Apr. 27, 1999]

SALT LAKE CITY CORPORATION
GRANTOR

/s/ Deedee Corradini

ATTEST & COUNTERSIGN

/s/ Beverly Jones
Deputy City Recorder [SEAL]

STATE OF UTAH)
:ss.
County of Salt Lake)

On Apr 27 1999, personally appeared before me Deedee Corradini and Beverly Jones being by me duly sworn did say that they are the MAYOR and DEPUTY RECORDER, respectively, of Salt Lake City Corporation, a municipal corporation of the State of Utah, and that said persons duly acknowledged to me that said corporation executed the same.

/s/ Scott C. Crandall
NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:

[SEAL]

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS
GRANTEE

By: /s/ Richard C. Edgley
Title: Authorized Agent

STATE OF UTAH)
:ss.
County of Salt Lake)

On April 27, 1999, personally appeared before me Richard C. Edgley, personally known to me to be the authorized agent of the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, who acknowledged to me that he/she signed the foregoing instrument as AUTHORIZED AGENT for the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole, and that the seal impressed on the within instrument is the seal of said corporation, and the said authorized agent acknowledged to me that the said corporation executed the same.

[SEAL] /s/ Connie J. Roberts
NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:
Mar 1, 2000

EXHIBIT "A"

MAIN STREET PROPERTY DESCRIPTION

Beginning at the Southeast corner of Block 87, Plat A, Salt Lake City Survey, located in the Southwest quarter of section 31, Township 1 North, Range 1 East, Salt Lake Base Meridian, and running thence North 00°01'42" west 660 feet along the east line of said block 87 to the Northeast corner of said block 87. Thence North 81°22'22" East 134.07 feet to the South right of way line of North Temple Street, a point that is North 00°02'13" West 18 feet from the Northwest Corner of Block 88, Plat A, thence South 00°02'13" East 678 feet along the west line of block 88 to the Southwest corner of block 88: thence South 89°05'14" West 132.68 feet to the point of beginning.

Form No. 1344-A (1982) ORDER NO. 500353
ALTA Plain Language Commitment

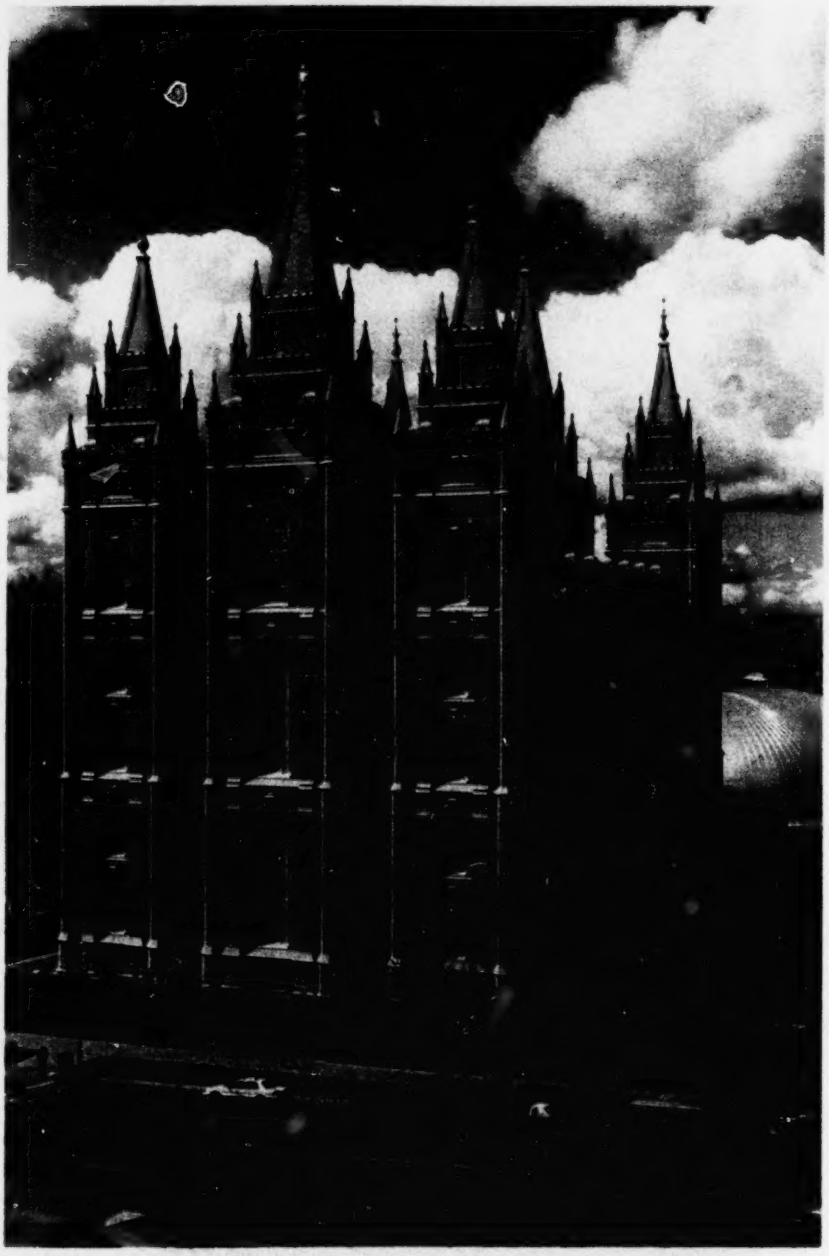
DESCRIPTION

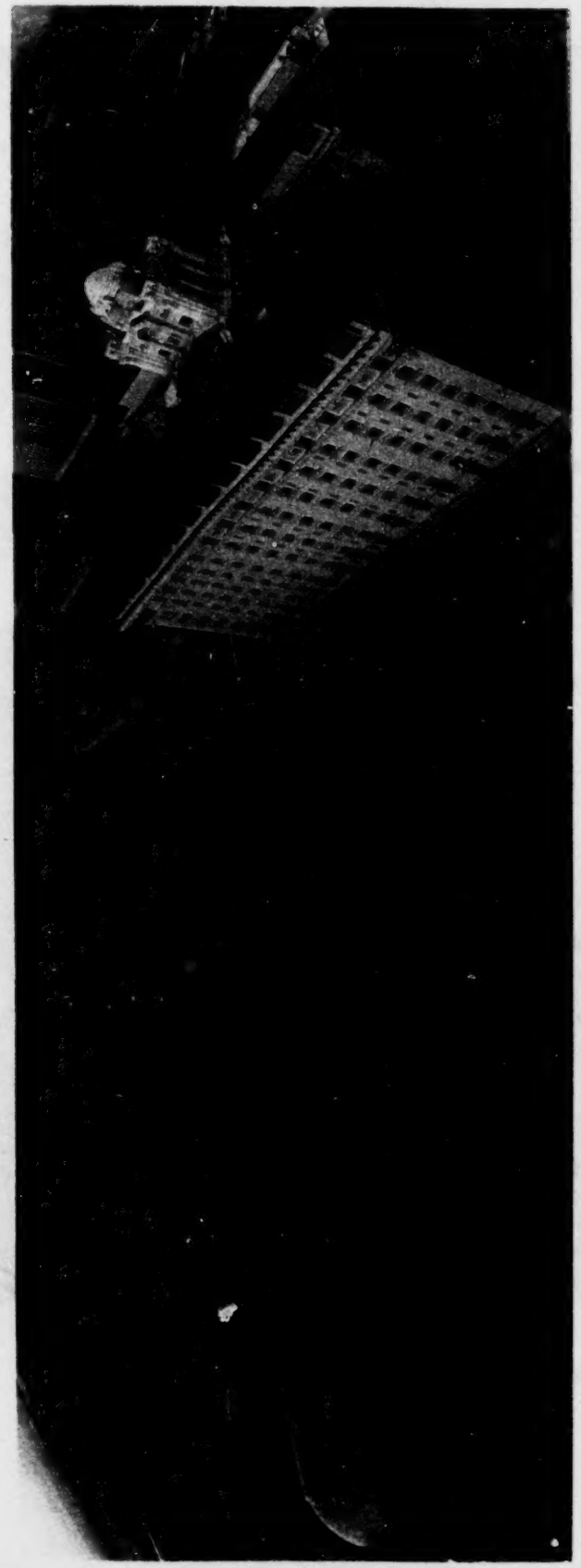
Beginning at the Southeast Corner of Block 87, Plat "A" Salt Lake City Survey, located in the Southwest Quarter of Section 31, Township 1 North, Range 1 East, Salt Lake Base and Meridian and running thence North 00°01'42" West 660.00 feet along the East line of said Block 87 to the Northeast Corner of said Block 87; thence North 81°22'22" East 134.07 feet to the South right-of-way of North Temple Street, a point that is North 00°02'13" West 18.00 feet from the Northwest Corner of Block 88, Plat "A", thence South 00°02'13" East 678.00 feet along the West line of Block 88 to the Southwest Corner of Block 88, thence South 89°05'14" West 132.68 feet to the point of beginning.

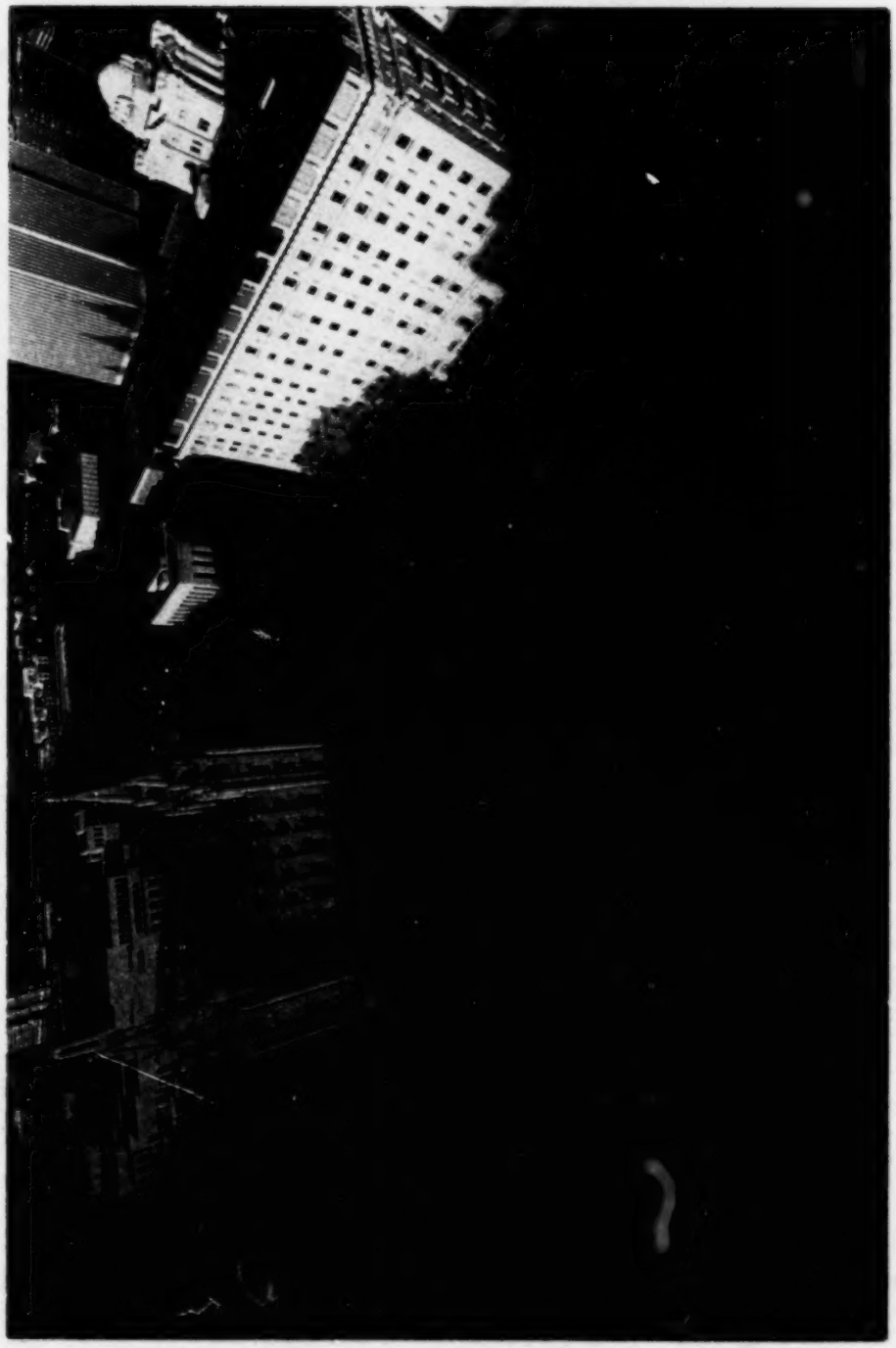
Less and excepting that portion conveyed in that certain Special Warranty Deed recorded November 9, 1993 as Entry No. 5651706 in Book 6797 at page 1426 of Official Records, being a parcel of land below the public right of way described as follows:

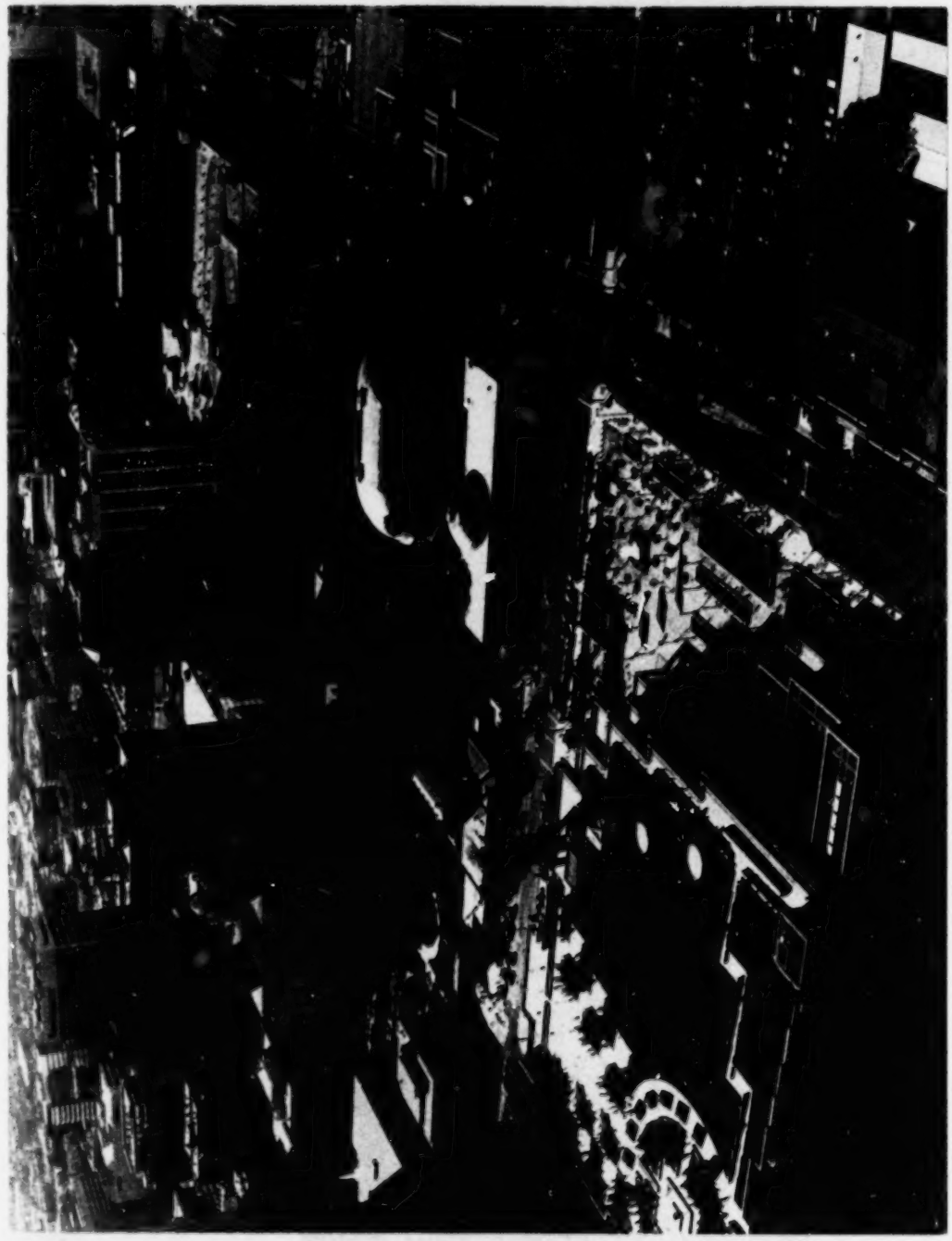
Beginning at the Southeast Corner of Block 87, Plat "A" Salt Lake City Survey, at elevation 4350.00 located in the Southwest Quarter of Section 31, Township 1 North, Range 1 East, Salt Lake Base and Meridian and running thence North 00°01'42" West 660.00 feet along the East line of said Block 87 to the Northeast Corner of said Block 87; at elevation 4358.65 thence North 81°22'22" East 134.07 feet to the South right-of-way of North Temple Street, a point that is North 00°02'13" West 18.00 feet from the Northwest Corner of Block 88, Plat "A", at elevation 4350.00 thence South 00°02'13" East 678.00 feet along the West line of Block 88 to the Southwest Corner of Block 88, at elevation 4350.00; thence South 89°05'14" West 132.68 feet to the point of beginning.

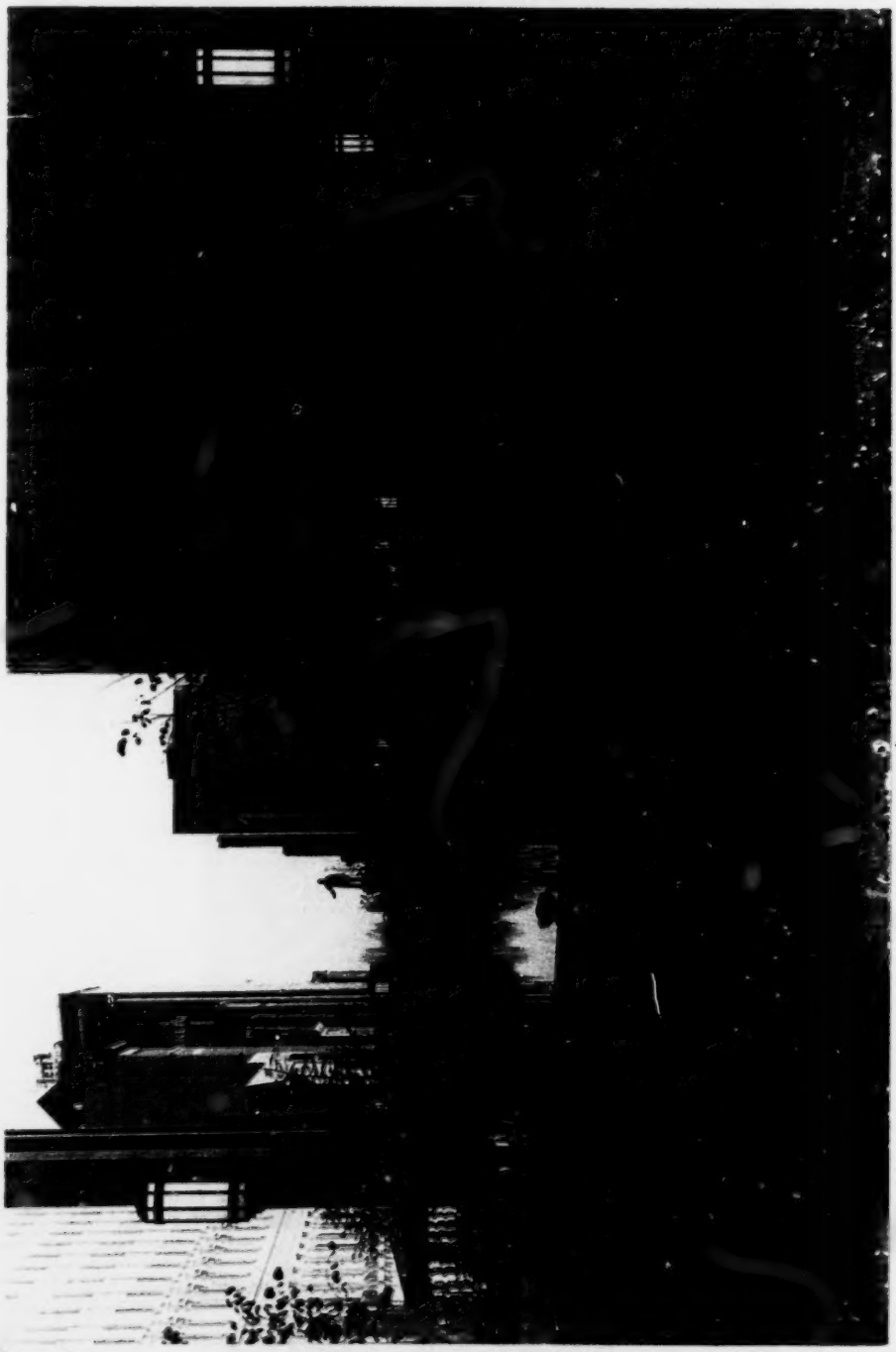
APPENDIX F

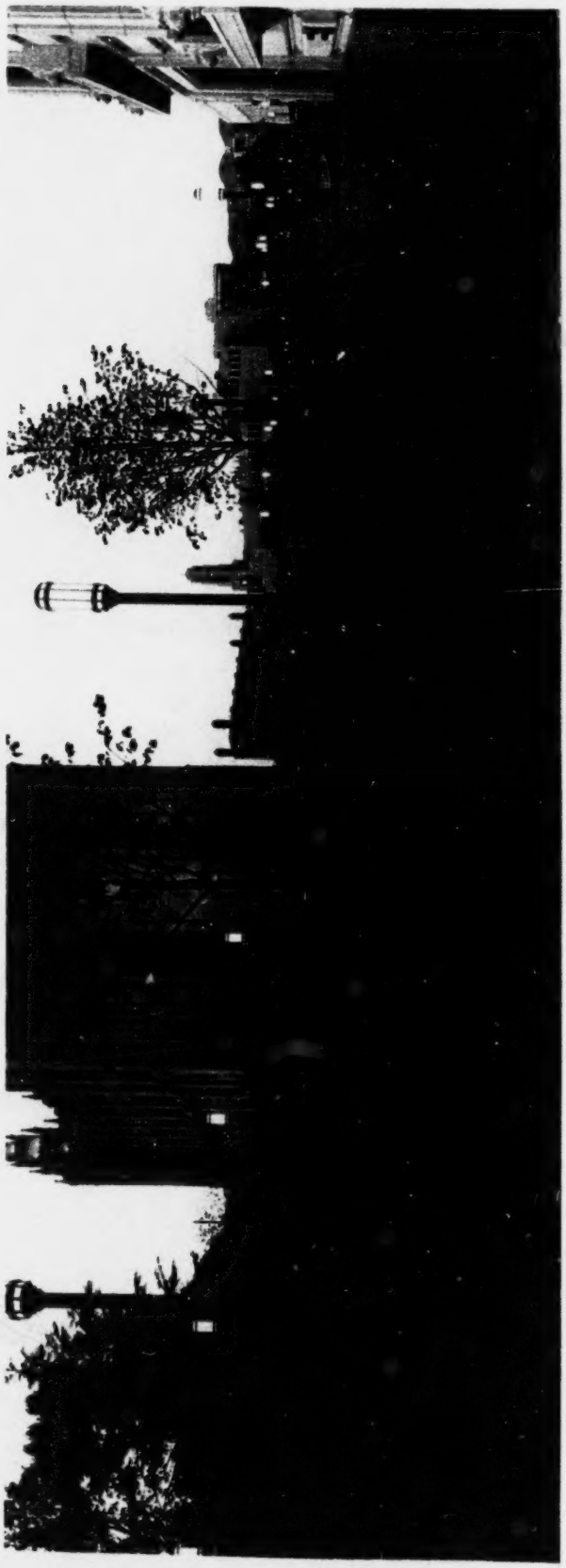




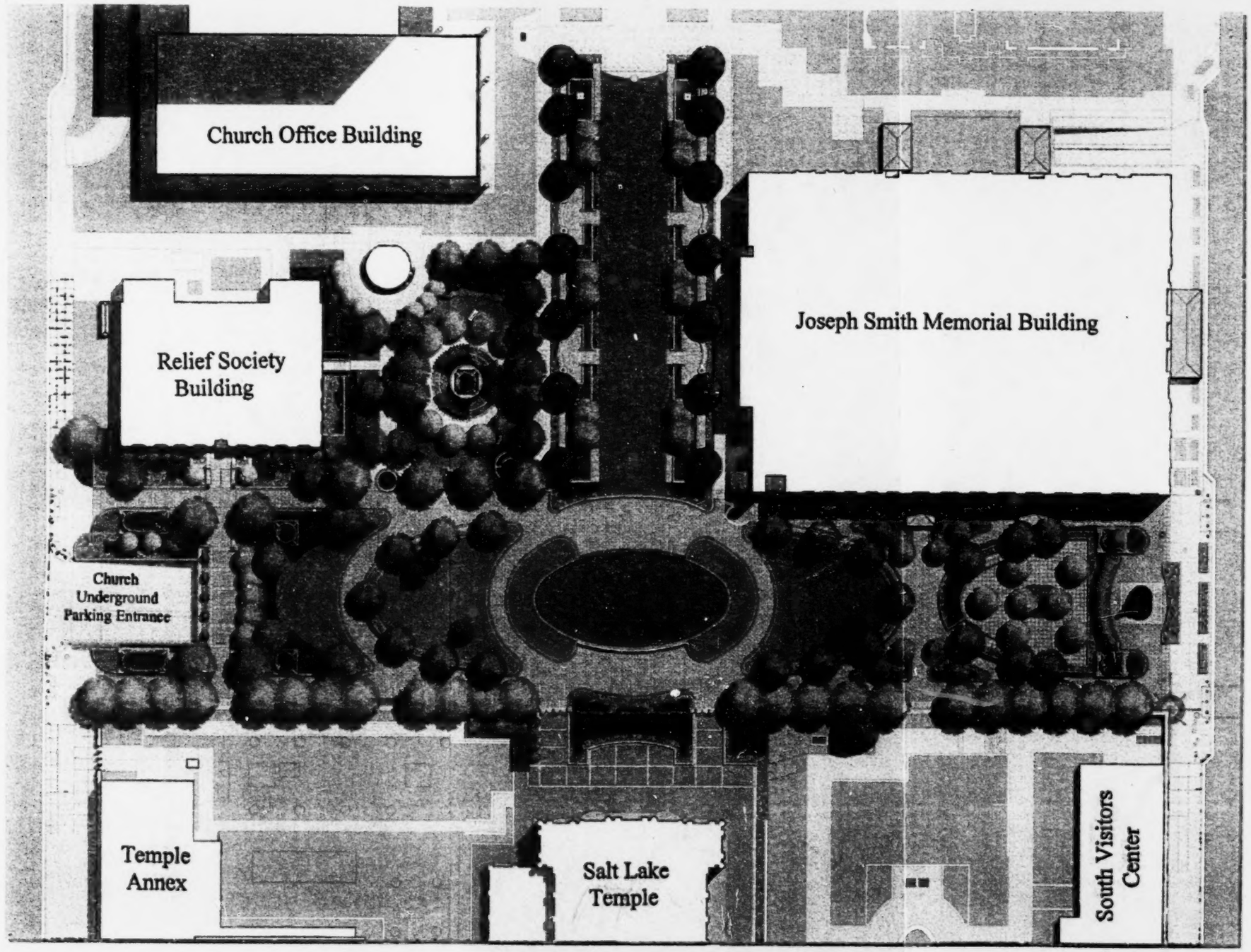








APPENDIX G



LDS Church Plaza

North

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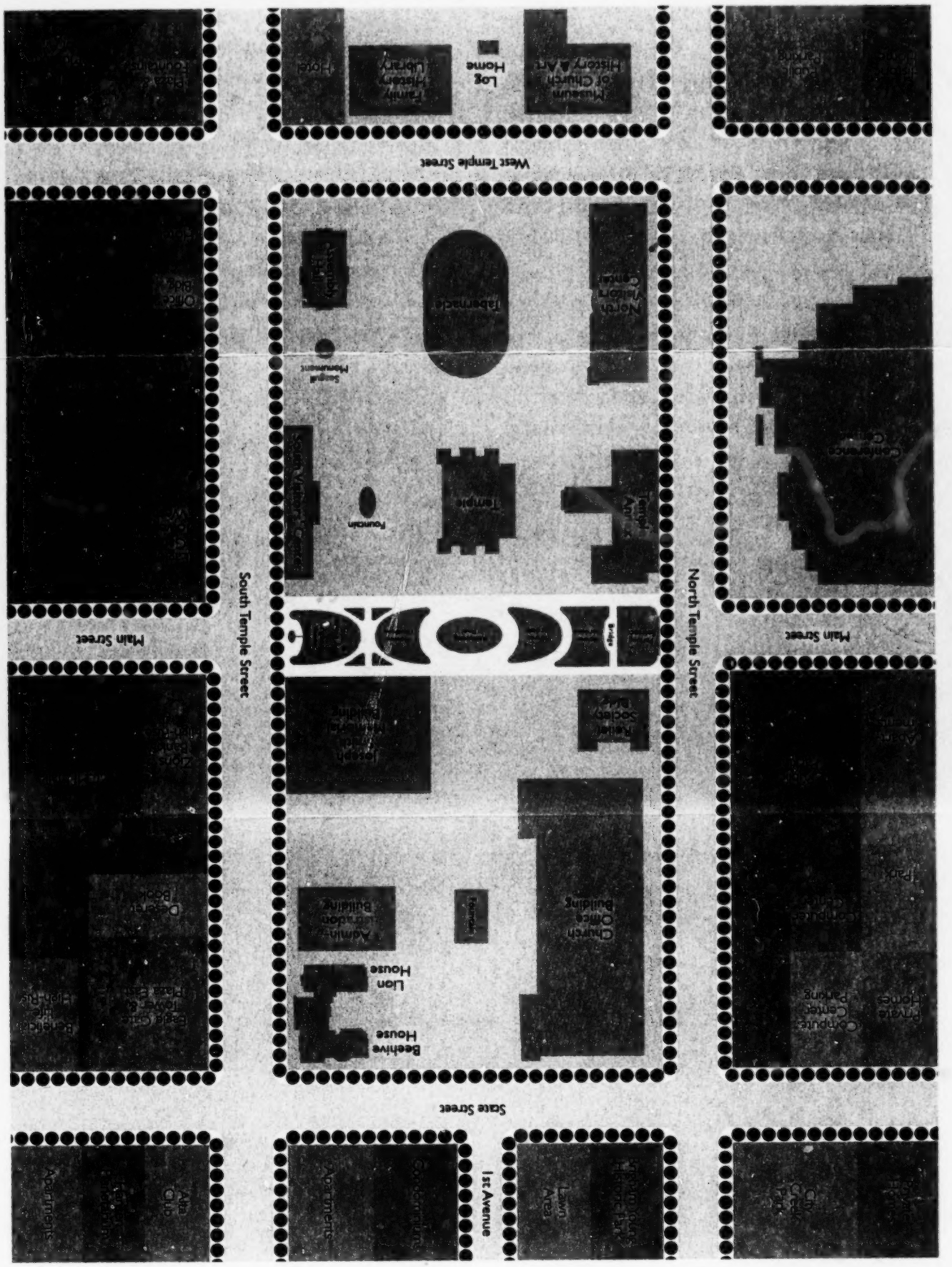

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